Chapter 5:
Sentencing under G.S. 20-179

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DRAFT: April 1, 2014

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I. Introduction

Sentencing for most misdemeanor and felony convictions in North Carolina is governed by the structured sentencing provisions set forth in Article 81B of Chapter 15A of the General Statutes (hereinafter G.S.).[1] The misdemeanor offense of impaired driving as defined in G.S. 20-138.1 and several related offenses, however, are excepted from structured sentencing provisions and instead are sentenced pursuant to G.S. 20-179. This chapter discusses these statutory sentencing provisions, including the determination of aggravating and mitigating factors, sentencing options for defendants sentenced at the various statutory levels, and the manner in which a sentence is served, including provisions for awarding jail credit and granting parole.

Experts writing about sentencing in impaired driving cases more than a decade ago stated that "[e]xcept for death penalty cases, no sentence requires more documentation."[2] Professors Loeb and Drennan were referring to the sentencing procedures codified in G.S. 20-179, which govern sentencing upon conviction under G.S. 20-138.1 (impaired driving) or G.S. 20-138.2 (impaired driving in a commercial vehicle) and upon a second or subsequent conviction of G.S. 20-138.2A (operating a commercial vehicle after consuming alcohol) or G.S. 20-138.2B (operating a school bus or child care vehicle after consuming). The offenses sentenced pursuant to G.S. 20-179 are referred to hereinafter as *covered offenses*.

The statutory requirements for documentation in sentencing of covered offenses—all of which are misdemeanors—have not lessened over the past decade; indeed, the entire sentencing scheme for such offenses has become more complex in recent years. Significant procedural changes to the sentencing scheme for impaired driving followed the United States Supreme Court's decision in *Blakely v. Washington*,[3] which elaborated upon its holding in *Apprendi v. New Jersey*[4] that the Sixth Amendment to the federal Constitution requires that any fact (other than a prior conviction) that increases the defendant's sentence beyond the statutory maximum must be submitted to a jury and found beyond a reasonable doubt. *Blakely* held that the statutory maximum for *Apprendi* purposes is not the maximum sentence that may be imposed for the most aggravated type of offense; instead, the statutory maximum 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.

Before the statutory provisions governing sentencing in impaired driving cases were amended in 2006,[5] post-*Blakely*, aggravating factors were determined by the judge, exposing defendants to increased levels of punishment carrying increased statutory maximum sentences. The State had to prove to a jury only the elements of the covered offense and then to prove to a judge, by a preponderance of the evidence, any applicable aggravating sentencing factors. The separation of offense- and offender-specific sentencing factors from the broadly defined elements of covered offenses was part of the General Assembly's effort in the Safe Roads Act of 1983[6] to curtail the charging discretion of district attorneys in

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[1]. *See* North Carolina General Statutes (hereinafter G.S.) 15A-1340.10.

[2]. BEN F. LOEB, JR. & JAMES C. DRENNAN, MOTOR VEHICLE LAW AND THE LAW OF IMPAIRED DRIVING IN NORTH CAROLINA 81 (UNC Institute of Government, 2000) (hereinafter MOTOR VEHICLE LAW).

[3]. 542 U.S. 296 (2004).

[4]. 530 U.S. 466 (2000).

[5]. S.L. 2006-253 (H 1048).

[6]. 1983 N.C. Sess. Laws ch. 435.

prosecuting such crimes.[7] The legislature's creation of statutorily defined sentencing factors allowed judges to consider aggravating and mitigating offender and offense characteristics at sentencing and to impose a sentence tailored to the relative seriousness of the offense, while at the same time greatly limiting judges' discretion.[8] Post-*Blakely* amendments to G.S. 20-179 require that aggravating factors, other than the fact of a prior conviction, now be found by a jury (in superior court) and that all aggravating factors be proven beyond a reasonable doubt in both district and superior court.[9] The sentencing scheme was again amended in 2011 to create a new Aggravated Level One punishment for impaired driving, carrying a maximum term of three years imprisonment and to render the presence of one specified grossly aggravating factor[10] sufficient to trigger Level One punishment.[11]

The rigors and complexities of the sentencing scheme appear at odds with the misdemeanor classification of the covered offenses, raising the question of why such exacting requirements exist for sentencing in a misdemeanor criminal case. One might question why impaired driving offenses are not punished under the structured sentencing provisions applicable to misdemeanors generally and, if further scrutiny and increased sanctions are necessary in light of the risks posed, why aggravated types of such offenses are not classified as felonies and sentenced accordingly. No official legislative commentary or historical record definitively resolves such queries, though the sentencing provisions clearly are part of a broader statutory scheme designed to deter people from driving while impaired, to

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[7]. *See* James C. Drennan, *Impaired Driving: The Safe Roads Act, in* NORTH CAROLINA LEGISLATION 1983 115 (Ann L. Sawyer ed., UNC Institute of Government, 1983) (hereinafter *Safe Roads Act*) (noting that the creation of a single crime with multiple levels of narrowly prescribed punishments limits officials' discretion in charging and judges' discretion in sentencing while treating defendants in different circumstances differently).

[8] . *See id*.

[9] . Post-*Blakely* amendments render largely, but not entirely, academic the question of whether G.S. 20-138.1 and G.S. 20-179 define one or six offenses. While the prosecutor is required to provide notice of intent to prove aggravating factors in superior court, *see* G.S. 20-179(a1)(1) (imposing an obligation much like a pleading requirement), no such notice of the State's intent is required in district court, meaning that, for district court prosecutions, those factors are not pleaded, functionally or otherwise, as elements. Other element-like treatment does, however, apply to such factors. As has already been noted, the factors, other than those related to proof of a prior conviction, must be proved beyond a reasonable doubt. In addition, the court of appeals held in State v. Hurt, 208 N.C. App. 1, 702 S.E.2d 82 (2010), *rev'd on other grounds*, ___ N. C. ___, 743 S.E.2d 173 (2013) (per curiam), that the Confrontation Clause of the Sixth Amendment to the U.S. Constitution applied to the proof at sentencing of sentencing factors that "if found, increase the defendant's sentence beyond the statutory maximum." *Id.* at 6, 702 S.E.2d 82, 87, *rev'd on other grounds*, ___ N. C. ___, 743 S.E.2d 173 (2013). The court of appeals' opinion in *Hurt* subsequently was reversed by the North Carolina Supreme Court on the grounds that the defendant's confrontation rights were not violated by the testifying experts' reliance on reports prepared by experts who did not testify at trial. ___ N.C. at ___; 743 S.E.2d at 173 (per curiam). Following the reversal of the court of appeals *Hurt*, it remains unclear whether the State may, for example, introduce at a G.S. 20-179 sentencing hearing over a defendant's objection the affidavit of a non-testifying chemical analyst to prove the aggravating factor in G.S. 20-179(d)(1) that the defendant had an alcohol concentration of 0.15. *See* Shea Denning, "What's Blakely Got to Do With It? Sentencing in Impaired Driving Cases After Melendez-Diaz," *North Carolina Criminal Law*, *UNC School of Government Blog* (July 24, 2009), http://sogweb.sog.unc.edu/blogs/ncclaw/?p=567.

[10]. *See* G.S. 20-179(c) (requiring a judge to impose Level One punishment if it is determined that the grossly aggravating factor in subdivision (4) applies); *id*. § 20-179(c)(4) (rendering driving by the defendant while (i) a child under the age of 18, (ii) a person with the mental development of a child under the age of 18, or (iii) a person with a physical disability preventing unaided exit from the vehicle was in the vehicle at the time of the offense a grossly aggravating factor).

[11]. *See* S.L. 2011-191; 2011-329.

prevent injury, and to punish and rehabilitate offenders.[12] Many components of that broader scheme are unrelated to sentencing; some, like provisions for immediate civil license revocations,[13] do not even require conviction. Others relate to collateral consequences imposed upon offenders, such as the seizure, impoundment, and forfeiture of vehicles,[14] the revocation of offenders' licenses upon conviction,[15] and administrative requirements that a person install an ignition interlock device in order to have his or her driver's license restored[16] or to obtain a limited driving privilege.[17] North Carolina's legislature has enacted many of the sanctions and prophylactic approaches to reduce impaired driving advocated by highway safety experts, including the National Highway Transportation Safety Administration (NHTSA). NHTSA's guide to sentencing impaired driving offenders characterizes the key to reducing incidences of impaired driving as certain, consistent, and coordinated sentencing.[18] By defining factors associated with the defendant and the offense that dictate the appropriate level of sentencing, along with a relatively limited menu of sentencing options for each level of driving while impaired (DWI), G.S. 20-179 arguably comports with NHTSA's recommendation that "[s]entencing . . . should be consistent from one court to another, . . . yet balanced with the need for matching offenders to the most appropriate sanctions and extent of treatment."[19] The sentencing scheme also integrates more traditional punitive sanctions with treatment requirements and licensure consequences. And the transmission of information between the courts and the administrative agencies responsible for treatment and licensure appears to provide some of the coordination of communication to ensure compliance with sentences that NHTSA recommends.

North Carolina's appellate courts have repeatedly held that defendants convicted of impaired driving must be sentenced in accordance with G.S. 20-179.[20] Indeed, the state supreme court has interpreted G.S. 20-179 to *require* sentencing pursuant to its provisions to the exclusion of dispositions like a prayer for judgment continued,[21] despite the lack of explicit language in G.S. 20-179 barring prayers for

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[12]. *See* Drennan, *Safe Roads Act*, at 116.

[13]. G.S. 20-16.5.

[14]. *Id*. § 20-28.3.

[15]. *Id*. §§ 20-17(a)(2), (13), (14).

[16]. *Id*. § 20-17.8.

[17]. *Id*. § 20-179.3(c1).

[18]. U.S. DEP'T OF TRANSP., NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., A GUIDE TO SENTENCING DWI OFFENDERS (2d ed. 2005), www.nhtsa.gov/people/injury/alcohol/dwioffenders/A%20Guide2.pdf.

[19]. *Id*. at 3 (references omitted).

[20]. *See In re* Tucker, 348 N.C. 677, 501 S.E.2d 67 (1998) (noting in judicial disciplinary action district court judge's mistaken belief that mandatory sentencing provisions of G.S. 20-179 did not apply if he continued prayer for judgment to a date certain and then dismissed the case); *In re* Martin, 333 N.C. 242, 424 S.E.2d 118 (1993) (censuring district court judge for convicting defendants of reckless driving when they were charged with driving while impaired, acts that the judge knew to be improper and beyond the power of his office); *In re* Greene, 297 N.C. 305, 312, 255 S.E.2d 142, 147 (1979) (holding that North Carolina courts do not have an "'inherent power'" to continue prayer for judgment continued on conditions or to suspend sentence when the sentence (as it is for impaired driving convictions) is mandated by the General Assembly; directing named district court judge in adjudicating convictions for offenses sentenced pursuant to G.S. 20-179 to pronounce judgment in accordance with statute); see also State v. Petty, 212 N.C. App. 368, 711 S.E.2d 509 (2011) (recognizing that district court judge had no authority to arrest judgment upon defendant's conviction of impaired driving—an action that amounted to the entry of an invalid judgment).

[21]. *Greene*, 297 N.C. at 310, 255 S.E.2d. at 146. The entry of a prayer for judgment continued (PJC), as its terms imply, postpones (or continues) entry of judgment following conviction. Entry of this type of order sometimes is used to postpone (that is, continue) sentencing (in other words, entry of judgment) to a date certain. That type of PJC is permissible following conviction of a covered offense. What is impermissible is entry of a PJC that postpones

judgment in impaired driving cases. This interpretation of G.S. 20-179 differs markedly from that applied to the misdemeanor sentencing provisions for other traffic offenses, for which a disposition of prayer for judgment is permissible except where expressly barred by statute.[22]

II. Sentencing Procedures

A. Sentencing Hearing in District Court

Because all covered impaired driving offenses are misdemeanors, the district court has exclusive, original jurisdiction over cases charging covered offenses except when (1) the charges are made in an indictment initiated by a grand jury presentment, (2) a covered offense is consolidated for trial with a felony, (3) a conviction for a covered offense results from a plea in lieu of a felony charge, or (4) a covered offense is a lesser-included offense of a felony.[23] Because there is no right to trial by jury in criminal cases in district court,[24] the district court judge makes the findings of aggravating and mitigating factors required by G.S. 20-179 in a sentencing hearing held in district court after a defendant is convicted of a covered offense.[25] A district court must likewise conduct a sentencing hearing when a covered offense is remanded to district court after an appeal to superior court.[26]

B. Sentencing Hearing in Superior Court

A sentencing hearing likewise must be held after a defendant is convicted of a covered offense in superior court, regardless of whether the covered offense was tried initially in superior court (because it was initiated by presentment or joined with a related felony charge) or was tried de novo upon an appeal from a district court conviction. In superior court, a jury must determine the existence of any aggravating factor other than the fact of a prior conviction.[27] The jury impaneled for the trial may, in the same trial, determine if one or more aggravating factors is present, unless the court determines that the interests of justice require that this determination be made in a separate sentencing proceeding.[28] If the court determines that a separate proceeding is required, the proceeding must be conducted by the trial judge before the trial jury as soon as practicable after the guilty verdict is returned.[29]

If a juror dies, becomes incapacitated or disqualified, or is discharged after the jury returns its verdict on the underlying charges but before the trial jury begins its deliberations on the issue of whether one or more aggravating factors exists, an alternate juror chosen based on the order in which alternate jurors

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judgment indefinitely or with no date certain, which may result in judgment never being imposed following conviction of a covered offense, or entry of a PJC that is followed by dismissal of the charges.

[22]. *See, e.g.*, G.S. 20-217(e) (providing that a person who passes a stopped school bus "shall not receive a prayer for judgment continued under any circumstances").

[23]. *See id*. § 7A-272(a) (setting forth jurisdiction of district court); 7A-271 (prescribing jurisdiction of superior court).

[24]. *Id*. § 7A-196(b).

[25]. *See id*. § 20-179(a).

[26]. *Id*.

[27]. *Id*. § 20-179(d).

[28]. *Id*. § 20-179(a1)(2).

[29]. *Id*.

were selected becomes a part of the jury.[30] If the trial jury is unable to reconvene for a hearing on the issue of whether one or more aggravating factors exist after having determined the guilt of the accused, the trial judge must impanel a new jury to determine the issue.[31] A jury selected to determine whether one or more aggravating factors exist must be selected in the same manner as juries are selected for the trial of criminal cases.[32]

If a defendant admits that an aggravating factor exists but pleads not guilty to the underlying charge, a jury must be impaneled to dispose of the charge only.[33] In such a case, evidence that relates solely to the establishment of an aggravating factor may not be admitted at trial.[34] If a defendant pleads guilty to the charge but contests the existence of one or more aggravating factors, a jury must be impaneled to determine if the aggravating factor or factors exist.[35]

C. Standard of Proof

In both district and superior courts, the State must prove beyond a reasonable doubt that an aggravating factor exists unless the defendant admits to the existence of the factor.[36] If the defendant does not admit to the existence of an aggravating factor (other than the fact of a prior conviction), in superior court, only the jury may determine if it is present.[37] In district court, the judge determines the existence of both aggravating and mitigating factors.[38] In both forums, the defendant bears the burden of proving by a preponderance of the evidence that a mitigating factor exists.[39]

D. Levels of Punishment

G.S. 20-179 sets forth six levels of punishment applicable to covered offenses committed December 1, 2011, or later: Aggravated Level One, Level One, Level Two, Level Three, Level Four, and Level Five. The discussion in this section is applicable to offenses committed on or after this date.[40] A summary of the six levels of punishment and the sanctions applicable for each may be found in Appendix B. For offenses committed before December 1, 2011, there are five possible levels of punishment, Levels One through Five. For those offenses, Level One applies if there are two or more grossly aggravating factors. Level Two applies if there is one grossly aggravating factor, regardless of type. A summary of the five punishment levels and their sanctions for offenses committed before December 1, 2011, may be found in Appendix C.

Certain aggravating factors, termed "grossly aggravating factors," are deemed more serious than other

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[30]. *Id*. § 20-179(a1)(3).
[31]. *Id*.
[32]. *Id*. § 20-179(a1)(4); *see also* G.S. Chapter 15A, Article 72 (setting forth procedures for selecting and impaneling a jury).
[33]. G.S. 20-179(a2)(1).
[34]. *Id*.
[35]. *Id*. § 20-179(a2)(2).
[36]. *Id*. §§ 20-179(a)(1), (a1)(2).
[37]. *Id*. § 20-179(a1)(2).
[38]. *Id*. § 20-179(a).
[39]. *Id*. §§ 20-179(a)(1), (a1)(2).
[40]. Note that for offenses committed December 1, 2012, and later, recent legislative amendments have resulted in changes to certain punishments. These changes are discussed in more detail in the text at *infra* §§ V.B.1. and V.C.1., and a chart setting out punishments applicable after December 1, 2012, is presented as Appendix A.

factors and thus have a greater impact on the defendant's sentence. Upon sentencing pursuant to G.S. 20-179, the appropriate finder of fact must *first* determine whether any grossly aggravating factors exist.[41] If it is determined that three or more grossly aggravating factors exist, the judge must impose Aggravated Level One punishment. [42] If the grossly aggravating factor in G.S. 20-179(c)(4) exists (driving while a child, person with the mental capacity of a child, or a disabled person is in the vehicle) or if two other grossly aggravating factors exist, the judge must impose Level One punishment.[43] If only one of the other grossly aggravating factors applies, the judge must impose Level Two punishment.[44]

In imposing Aggravated Level One, Level One, or Level Two punishment, the judge may, but is not required to, consider the aggravating and mitigating factors in G.S. 20-179(d) and (e) in determining the appropriate sentence. Because a jury must determine the presence of both grossly aggravating and aggravating factors in superior court, the jury will be asked to determine whether either type of aggravating factor exists.[45] If the jury finds factors in aggravation, the court must enter those findings on the court's determination of sentencing factors form[46] or on some "comparable document."[47] In district court a judge may elect not to formally determine the presence of aggravating or mitigating factors if he or she finds that one or more grossly aggravating factors applies.[48]

If there are no grossly aggravating factors in the case, the judge in district court or the jury in superior court must determine all aggravating factors.[49] The judge must weigh the seriousness of each aggravating factor in light of the particular circumstances of the case.[50] The judge also must determine whether any mitigating factors apply and must weigh the degree of mitigation of each factor in light of the particular circumstances of the case.[51]

All aggravating and mitigating factors must be entered in writing.[52] Aggravating factors found by a jury must be entered on the court's determination of sentencing factors form[53] or some "comparable document" used to record the findings of sentencing factors.[54]

If the judge or the jury in the sentencing hearing determines that there are no grossly aggravating factors, the judge must weigh the aggravating and mitigating factors.[55] If the judge determines that the aggravating factors "substantially outweigh" any mitigating factors, the judge must note in the judgment

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[41]. *Id*. § 20-179(c).
[42]. *Id*.
[43]. *Id.*; *id*. § 20-179(c)(4) (defining, as a grossly aggravating factor, "[d]riving by the defendant while (i) a child under the age of 18 years, (ii) a person with the mental development of a child under the age of 18 years, or (iii) a person with a physical disability preventing unaided exit from the vehicle was in the vehicle at the time of the offense").
[44]. *Id*. § 20-179(c).
[45]. *See, e.g.*, N.C. PATTERN INSTRUCTION—CRIM. 270.15 (Aggravating Factors for Impaired Driving.—G.S. 20-179).
[46]. AOC-CR-311 is the "Impaired Driving Determination of Sentencing Factors Form."
[47]. G.S. 20-179(c1).
[48]. *See id*. § 20-179(c).
[49]. *Id*. § 20-179(d).
[50]. *Id*. § 20-179(d).
[51]. *Id*. § 20-179(e).
[52]. *Id*. § 20-179(c1).
[53]. *See* AOC-CR-311 (reprinted in Appendixes D and E).
[54]. G.S. 20-179(c1).
[55]. *Id*. § 20-179(f).

the factors found and his or her finding that the defendant is subject to Level Three punishment.[56] The judge must then impose a punishment within the limits defined in G.S. 20-179(i).[57]

If there are no aggravating and mitigating factors or the judge determines that the aggravating factors are "substantially counterbalanced" by mitigating factors, the judge must note in the judgment any factors found and the finding that the defendant is subject to Level Four punishment and impose a punishment within the limits defined in G.S. 20-179(j).[58]

If the judge determines that the mitigating factors substantially outweigh any aggravating factors, the judge must note in the judgment the factors found and his or her finding that the defendant is subject to Level Five punishment and impose a punishment within the limits defined in G.S. 20-179(k).[59]

E. Duties of Prosecutor in District Court

Before a sentencing hearing for a covered offense in district court, the prosecutor must make all feasible efforts to obtain the defendant's full record of traffic convictions and must present this record to the judge for consideration at the hearing.[60] Upon the defendant's request, the prosecutor must provide to the defendant or his or her attorney a copy of the defendant's record of traffic convictions at a reasonable time before introducing the record into evidence.[61] In addition, the prosecutor must present all other appropriate grossly aggravating and aggravating factors of which he or she is aware, and the defendant or his or her attorney may present all appropriate mitigating factors.[62] If a "valid chemical analysis"[63] was made of the defendant, the prosecutor must present evidence of the resulting alcohol concentration.[64]

F. Duties of Prosecutor in Superior Court

Pursuant to G.S. 20-179(a1)(1), if the State intends to prove one or more aggravating factors for a covered offense that a defendant has appealed to superior court for trial de novo, the State must provide the defendant notice of its intent. The notice must be provided no later than ten days prior to trial and must contain a plain and concise factual statement indicating each factor the State plans to use. Unlike notice provisions under structured sentencing, which require the State to provide notice of

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[56]. *Id*. § 20-179(f)(1).
[57]. *Id*. § 20-179(f)(1).
[58]. *Id*. § 20-179(f)(2).
[59]. *Id*. § 20-179(f)(3).
[60]. *Id*. § 20-179(a)(2).
[61]. *Id.* § 20-179(a).
[62]. *Id.*
[63]. A chemical analysis is "[a] test or tests of the breath, blood, or other bodily fluid or substance of a person to determine the person's alcohol concentration or presence of an impairing substance, performed in accordance with G.S. 20-139.1, including duplicate or sequential analyses." G.S. 20-4.01(3a). A breath test "administered pursuant to the implied-consent law" and performed in accordance with rules of the Department of Health and Human Services (DHHS) by a person with a current DHHS permit for the type of instrument employed is an admissible chemical analysis. *Id*. § 20-139.1(b). A blood or urine test likewise is deemed an admissible chemical analysis if (1) a law enforcement officer or chemical analyst requested a blood and/or urine sample from the person charged; and (2) a chemical analysis of the person's blood was performed by a chemical analyst possessing a DHHS permit for the type of analysis performed. *See id*. § 20-139.1(c4).
[64]. *Id*. § 20-179(a)(2).

aggravating factors but not prior convictions,[65] G.S. 20-179(a1)(1) requires the State to provide notice of any aggravating factor it intends to use under G.S. 20-179(c) or (d), which includes the aggravating factors premised on prior convictions.

The notice provisions of G.S. 20-179 were enacted as part of the Motor Vehicle Driver Protection Act of 2006[66] and were crafted to protect a defendant's Sixth Amendment[67] right to be informed of the charges being brought against him or her.[68] The Administrative Office of the Courts has promulgated form AOC-CR-338 (reprinted as Appendixes F and G) to facilitate compliance with the notice requirement in G.S. 20-179(a1)(1). If the State fails to provide the statutorily required notice, then neither the jury nor the judge may find the factor applicable at sentencing. The court of appeals in *State v. Mackey*[69] held that the trial court erred by sentencing a defendant in the aggravated range when the State in a structured sentencing case failed to provide proper written notice of aggravating factors pursuant to G.S. 15A–1340.16(a6). In so holding, *Mackey* noted that "[t]he State had at its disposal a form routinely used by prosecutors to comply with this minimal requirement."[70] The court of appeals *in State v. Reeves*[71] relied upon *Mackey* in vacating a defendant's Level Three DWI sentence and remanding for resentencing due to the State's failure to provide the statutorily required notice of its intent to use an aggravating factor. In *Reeves*, the defendant was convicted of reckless driving to endanger in violation of G.S. 20-140(b) in addition to impaired driving. The State relied upon the aggravating factor of "especially reckless" driving in support of an aggravated sentence. The trial judge determined that this factor substantially outweighed any mitigating factor and imposed Level Three punishment.[72]

Somewhat curiously, G.S. 20-179(a1)(1) states that it applies "If the defendant appeals to superior court, and the State intends to use one or more aggravating factors," giving rise to a question about whether it governs the trial of covered offenses within the original jurisdiction of the superior court. Though most covered offenses originate in district court, as they are all misdemeanors, a covered offense will fall within the original jurisdiction of the superior court when it (1) is consolidated for trial with a felony, (2) results from a plea in lieu of a felony charge, (3) is a lesser-included offense of a felony, or (4) results from an indictment initiated by presentment.[73] Given that there is no principled reason for requiring notice only for covered offenses appealed from district court, a court might, notwithstanding the introductory clause of G.S. 20-179(a1)(1), cited above, construe the statutory notice provision as applying to all covered offenses, regardless of where they originate. For that reason, it appears that the State is well-advised to provide notice of aggravating factors for covered offenses originally tried in superior court as well as those appealed from district court. Nevertheless, in a case within the original

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[65]. *See id*. § 15A-1340.16(a6).

[66]. S.L. 2006-253.

[67]. U.S. CONST. amend. VI.

[68]. For a thorough analysis of the impetus for imposing similar notice requirements upon the State in structured sentencing cases post-*Blakely*, see Jessica Smith, *North Carolina Sentencing after* Blakely v. Washington *and the* Blakely *Bill* (UNC School of Government, Sept. 2005), 10–13, *online at* http://www.sog.unc.edu/sites/www.sog.unc.edu/files/Blakely%20Update.pdf.

[69]. 209 N.C. App. 116, 708 S.E.2d 719 (2011).

[70]. *Id.* at 121, 708 S.E.2d at 722.

[71]. ___ N.C. App. ___, 721 S.E.2d 317, 322 (2012).

[72]. The trial judge arrested judgment on the reckless driving conviction on the basis that it was " 'used to enhance the DWI,' " ___ N.C. App. at ___, 721 S.E.2d at 319 (quoting trial court), an action that does not appear to be required as a matter of constitutional law, as discussed *infra* at § III.A.2.e.

[73]. *See* G.S. 7A-271(a); 7A-272(a).

jurisdiction of the superior court in which the State fails to provide such notice, there is a colorable argument that the State's failure to do so is not a statutory violation.

III. Aggravating Factors

A. Grossly Aggravating Factors

As previously mentioned, grossly aggravating factors are deemed more serious than mere aggravating factors and have a greater impact upon the defendant's sentence. The presence of a single grossly aggravating factor renders a defendant subject to sentencing at Level Two (or Level One, depending upon the date of the covered offense and which factor is present), which carries a maximum sentence of 12 months' imprisonment. The presence of three or more grossly aggravating factors for a covered offense committed on or after December 1, 2011, renders the offense an Aggravated Level One offense, punishable by up to 3 years imprisonment.

There are four grossly aggravating factors: (1) a qualifying prior conviction for an offense involving impaired driving; (2) driving while license revoked for an impaired driving revocation, (3) serious injury to another person caused by the defendant's impaired driving; (4) driving with one of the following types of individuals in the vehicle: (i) a child under the age of 18, (ii) a person with the mental development of a child under 18, or (iii) a person with a physical disability preventing unaided exit from the vehicle.[74]

1. Qualifying Prior Conviction for an Offense Involving Impaired Driving

The first grossly aggravating factor is a qualifying prior conviction for an offense involving impaired driving. An *offense involving impaired driving* is defined in G.S. 20-4.01(24a) as any of the following offenses:

Impaired driving under G.S. 20-138.1
Habitual impaired driving under G.S. 20-138.5
Impaired driving in commercial vehicle under G.S. 20-138.2
Any offense under G.S. 20-141.4 (felony and misdemeanor death by vehicle and serious injury by vehicle) based on impaired driving
First- or second-degree murder under G.S. 14-17 based on impaired driving
Involuntary manslaughter under G.S. 14-18 based on impaired driving
Substantially similar offenses committed in another state or jurisdiction

A prior conviction for an offense involving impaired driving qualifies as a grossly aggravating factor if

> (a) the conviction occurred within seven years before the date of the offense for which the defendant is being sentenced; or (b) the conviction occurs after the date of the offense for which the defendant is presently being sentenced, but prior to or contemporaneously with the present sentencing; or (c) the conviction occurred in district court; the case was appealed to superior court; the appeal has been withdrawn or the case has been remanded back to district court; and a new sentencing hearing has not been held pursuant to G.S. 20-38.7.

[74]. *Id*. § 20-179(c).

Each prior conviction is a separate grossly aggravating factor.[75]

a. What Counts as a Conviction? The term "conviction" is defined in G.S. 20-4.01(4a) to include, among other adjudications, a "final conviction of a criminal offense, including a no contest plea."[76] Typically, for sentencing purposes, a defendant is said to have been convicted when he or she has been adjudged guilty or has entered a plea of guilty,[77] though sentencing may not occur and the conviction may not become final until some later date. The term "final conviction," as used in G.S. Chapter 20, has been construed to mean an adjudication of guilt plus the entry of a judgment from which a defendant can exercise his or her right to appeal.[78]

Under structured sentencing, a district court conviction that occurs before the date a criminal judgment is entered for the current offense is deemed a "prior conviction" if the defendant has not given notice of appeal and the time for appeal has expired.[79] Superior court convictions that occur before the date of judgment for the current structured sentencing offense, in contrast, are deemed prior convictions regardless of whether they are appealed to the appellate division.[80] The additional requirements necessary for a district court conviction to qualify as a prior conviction stem from a defendant's right to appeal a misdemeanor district court conviction to superior court for trial de novo by jury—a statutory right afforded by G.S. 15A-1431(b) to effectuate the constitutional right to trial by jury.[81] Arguably, the term "final conviction" in G.S. 20-4.01(4a) likewise protects a defendant's constitutional right to trial by jury by permitting a defendant's sentence to be enhanced by, and collateral consequences to ensue

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[75]. *Id*. § 20-179(c)(1).

[76]. *Id*. § 20-4.01(4a)a.1. "Conviction," when referring to an offense committed in North Carolina, also means any of the following: (1) "[a]n unvacated forfeiture of cash in the full amount of a bond required by Article 26 of Chapter 15A of the General Statutes," *id*. § 20-4.01(4a)a.3.;" (2) "a third or subsequent prayer for judgment continued within any five-year period," *id*. § 20-4.01(4a)a.4.; or (3) "[a]ny prayer for judgment continued if the offender holds a commercial drivers license or if the offense occurs in a commercial motor vehicle." *Id*. § 20-4.01(4a)a.5. When referring to an offense committed outside North Carolina, the term "conviction" means (1) "[a]n unvacated adjudication of guilt;" (2) "[a] determination that a person has violated or failed to comply with the law in a court of original jurisdiction or an authorized administrative tribunal;" (3) "[a]n unvacated forfeiture of bail or collateral deposited to secure the person's appearance in court;" (4) "[a] violation of a condition of release without bail, regardless of whether or not the penalty is rebated, suspended, or probated;" (5) "[a] final conviction of a criminal offense, including a no contest plea;" or (6) "[a]ny prayer for judgment continued, including any payment of a fine or court costs, if the offender holds a commercial drivers license or if the offense occurs in a commercial motor vehicle." *Id*. §§ 20-4.01(4a)b.1.–6.

[77]. *Id*. § 15A-1331(b) (providing that "a person has been convicted when he has been adjudged guilty or has entered a plea of guilty or no contest").

[78]. *See* Barbour v. Scheidt, 246 N.C. 169, 173, 97 S.E.2d 855, 858 (1957) (holding that DMV lacked authority to revoke the petitioner's driver's license upon adjudication of guilt for speeding offense followed by entry of a prayer for judgment continued as "the conviction alone, without the imposition of a judgment from which an appeal might be taken, is not a final conviction" for purposes of license revocation statutes). The matter at issue in *Barbour* could now be resolved by statute, which defines a conviction as "[a] third or subsequent prayer for judgment continued within any five-year period," and "[a]ny prayer for judgment continued if the offender holds a commercial driver's license or if the offense occurs in a commercial motor vehicle." G.S. 20-4.01(4a)a.4., .5. As noted earlier, a judge may not lawfully dispose of a covered offense by granting a prayer for judgment continued. *See In re* Greene, 297 N.C. 305, 255 S.E.2d 142 (1979).

[79]. G.S. 15A-1340.11(7)a.

[80]. *Id.* § 15A-1340.11(7)b.

[81]. U.S. CONST. amend. VI. ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."); G.S. 7A-196(b) ("In criminal cases there shall be no jury trials in the district court. Upon appeal to superior court trial shall be de novo, with jury trial as provided by law.")

from, only those district court convictions that are not subject to a pending appeal to superior court. It appears, however, that in some circumstances, district court convictions that would not qualify as "prior convictions" under structured sentencing may be final convictions for purposes of G.S. 20-179.

G.S. 20-179(c)(1) defines a qualifying prior conviction to include a conviction that occurs "prior to or contemporaneously with" the current offense. If those convictions could not be considered as qualifying prior convictions until the time for appeal expired, this would, in effect, prevent convictions entered within ten days before sentencing for the current offense from being considered at all in the event those prior convictions were not appealed.

Consider this example. Defendant Dane is charged with impaired driving on November 3, 2012, and again on December 8, 2012. On February 20, 2013, Dane pleads guilty to and is sentenced at Level Five for the November 3, 2012, DWI. He doesn't orally provide notice of appeal. Later that day, Dane pleads guilty to and is sentenced for the December 8, 2012, DWI. Is the conviction for the November 3 offense a grossly aggravating factor? It appears to be a qualifying prior conviction entered either "prior to or contemporaneously with" the current sentencing. But if it cannot be considered a "final conviction" until after the time for appealing has expired, it cannot be counted. The outcome is that, by not appealing the conviction for the November 3 offense, Dane would be sentenced for two Level 5 DWIs. The General Assembly's inclusion of "contemporaneous" convictions as grossly aggravating factors strongly indicates that the legislature did not intend this result.

The apparent legislative intent and the protection of a defendant's right to a jury trial both are effectuated if one interprets the term "conviction," as used in G.S. 20-179(c)(1), to include district court convictions from which no notice of appeal has been filed—regardless of whether the time for filing a notice of appeal has yet expired. If a defendant's sentence is elevated based upon a prior conviction that subsequently is appealed and the defendant is acquitted upon trial de novo in superior court, the defendant presumably would be entitled to resentencing for the conviction that it enhanced, though, in many cases, the sentence may already have been served and collateral consequences suffered by the defendant as a result of the enhanced conviction.[82]
A prior conviction for an offense involving impaired driving may have been entered in superior court. This could occur, for example, upon a defendant's conviction for a misdemeanor impaired driving conviction appealed from district court, upon conviction of a felony offense involving impaired driving, or upon a defendant's conviction for a misdemeanor impaired driving offense initiated by presentment, tried in superior court as a lesser-included offense of a felony or consolidated for trial with a felony.[83] Whether a conviction in superior court from which an appeal has been entered to the court of appeals may be considered a final conviction is not entirely free from doubt, though the most plausible legislative interpretation is that entry of judgment in superior court renders a conviction in that tribunal final regardless of whether the matter has been appealed to the court of appeals. This interpretation accords with the structured sentencing rule defining a "prior conviction" in part as a previous conviction in superior court "regardless of whether the conviction is on appeal to the appellate division."[84] If the rule were otherwise, a defendant with a qualifying prior conviction appealed from superior court could

[82]. *See* State v. Bidgood, 144 N.C. App. 267, 276, 550 S.E.2d 198, 204 (2001) (finding that "it would be unjust to permit an enhanced sentence to stand where it is made to appear that the Prior Record Level has been erroneously calculated due to a subsequent reversal of a conviction on appeal" and remanding to the trial court "for entry of judgment which accurately reflects defendant's Prior Record Level").

[83]. G.S. 7A-271(a)(1), (2), (3).

[84]. *Id*. § 15A-1340.11(7)b.

be sentenced for a later conviction as though he or she had no prior conviction. The matter could not be redressed if the prior conviction was affirmed on appeal as the affirmance would, at most, trigger execution of the judgment (if it was stayed while the matter was pending before the appellate courts) and would not require resentencing. In contrast, if a prior conviction used to enhance a subsequent sentence is reversed on appeal, the defendant arguably has the right to a new sentencing hearing for the subsequent conviction.[85]

b. What Is the Date of a Prior Conviction? A "prior conviction for an offense involving impaired driving" is a grossly aggravating factor if "[t]he conviction occurred within seven years before the date of the offense for which the defendant is being sentenced."[86] Determining the date a "conviction occurred" when a conviction and judgment are entered in district court and not appealed or when conviction and judgment are entered in superior court is straightforward. Identifying the date of conviction in the case of a district court conviction for a covered offense that is appealed to superior court and subsequently remanded to district court for resentencing (for offenses committed on or after December 1, 2006) or for execution of the sentence (for earlier convictions) is more complicated. For covered offenses committed on or after December 1, 2006, giving notice of appeal from a conviction in district court vacates the sentence imposed.[87] In contrast, giving notice of appeal from a conviction for a structured sentencing misdemeanor merely stays the execution of all portions of the judgment; if the appeal subsequently is withdrawn, the case is remanded to district court for execution of the judgment.[88] When an appeal from a conviction for a covered offense committed December 1, 2006, or later is withdrawn, the district court must hold a new sentencing hearing and must consider any new convictions.[89] This divergent procedure was enacted to prevent a defendant with two pending covered offenses from avoiding application of a grossly aggravating factor for either conviction by appealing the conviction for the first covered offense and, while the case was on appeal, pleading guilty to and being sentenced for the second covered offense. The first conviction is not considered a prior conviction at the time of sentencing for the second covered offense because it is not a "final conviction" so long as the case is the subject of a pending appeal to superior court.[90] Before the 2006 statutory changes, a defendant could, after the second conviction was entered, withdraw the appeal of the first conviction, triggering execution of a sentence that did not take into account the second conviction.

When a defendant initially is convicted of and sentenced for an impaired driving offense on one date but the judgment becomes final on a later date and, in the case of post–December 1, 2006, offenses, judgment and sentence actually are entered at a later date, a question arises regarding the date on which the prior conviction "occurred" for purposes of considering the seven-year look-back period under G.S. 20-179(c)(1). Given that the term "conviction," when used in connection with sentencing generally means the determination of a defendant's guilt,[91] it seems likely that the date on which the defendant was adjudicated guilty is the date of conviction.[92] Moreover, if the term "final conviction"

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[85]. *See Bidgood*, 144 N.C. App. at 276, 550 S.E.2d at 204.

[86]. G.S. 20-179(c)(1)a.

[87]. *Id*. § 20-38.7 (c).

[88]. *Id*. §§ 15A-1431(f1), (g), (h).

[89]. *Id*. § 20-179(c).

[90]. *See id*. § 20-4.01(4a) (defining conviction as a "final conviction of a criminal offense," *id*. § 20-4.01(4a)a.1.).

[91]. *See id*. § 15A-1331(b) ("a person has been convicted when he has been adjudged guilty or has entered a plea of guilty or no contest"); State v. Canellas, 164 N.C. App. 775, 778, 596 S.E.2d 889, 891 (2004); State v. Wilkins, 128 N.C. App. 315, 317, 494 S.E.2d 611, 612 (1998).

[92]. *See, as to multiple convictions*, *Wilkins*, 128 N.C. App. 315, 494 S.E.2d 611 (determining for purposes of G.S. 15A-1340.14(d), which provides that for purposes of determining a defendant's prior record level for felony

primarily is a mechanism to protect a defendant's right to trial de novo by jury in superior court, then the counting of a final conviction as having occurred on the date of the initial conviction and sentencing in district court, even if it *became final* at some later date, does not compromise that right.

c. Proof of Prior Convictions. While a judge may accept any evidence as to the presence or absence of prior convictions that he or she finds reliable, a judge must give prima facie effect to convictions recorded by the North Carolina Division of Motor Vehicles (NC DMV) or any other state agency.[93] A copy of such conviction records transmitted by the police information network is admissible in evidence without further authentication.[94] If a 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 must afford the defendant an opportunity to introduce evidence and satisfy the defendant's burden of proving that the prior conviction was obtained when the defendant was indigent, had no counsel, and had not waived his right to counsel.[95]

2. Driving While License Revoked for an Impaired Driving Revocation under G.S. 20-28.2(a)

The second grossly aggravating factor is "[d]riving by the defendant at the time of the offense while his driver's license was revoked under G.S. 20-28, and the revocation was an impaired driving revocation under G.S. 20-28.2(a)."[96] For this factor to apply, each of the elements of driving while revoked as that offense is defined in G.S. 20-28 must be satisfied, though there is no requirement that the defendant be charged with or convicted of the offense of driving while license revoked.[97]

To commit the offense of driving while license revoked under G.S. 20-28(a), a person must drive a motor vehicle on a highway while his or her license is revoked. Because a bicycle is a *vehicle*[98] but is not a *motor vehicle*,[99] a defendant who commits the offense of impaired driving on a bicycle does not also commit the offense of driving while license revoked in violation of G.S. 20-28(a). Thus, the grossly aggravating factor set forth in G.S. 20-179(c)(2) does not apply to a person who commits a covered offense on a bicycle or some other vehicle, such as a moped,[100] that is not also a motor vehicle. Likewise, the aggravating factor does not apply to a defendant who, while his license was revoked for an impaired driving license revocation, commits a covered offense in a public vehicular area, such as a parking lot. Because the offense of driving while license revoked under G.S. 20-28(a) must be committed on a street

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sentencing purposes, if an offender is convicted of more than one offense in a single session of district court, only one of the convictions is used, that when a defendant is convicted in district court, appeals the conviction to the superior court, and subsequently withdraws the appeal causing the case to be remanded to the district court for execution of the judgment, the conviction occurs upon the date when the offender was originally convicted in the district court).

[93]. G.S. 20-179(o).

[94]. *Id*.

[95]. *Id.*; *see also id*. § 15A-980(a) (affording a defendant a right to suppress a prior conviction obtained in violation of his or her right to counsel).

[96]. *Id*. § 20-179(c)(2).

[97]. *Cf.* State v. Dewalt, 209 N.C. App. 187, 703 S.E.2d 872 (2011) (interpreting the aggravating factor of "[d]riving when the person's drivers license is revoked" set forth in G.S. 20-141.5(b)(5) for purposes of elevating the misdemeanor offense of speeding to elude arrest to a felony offense pursuant to G.S. 20-141.5 not to require proof of driving on a street or highway, as required by G.S. 20-28(a), because driving while license revoked, unlike several other aggravating factors listed in G.S. 20-141.5(b), did not incorporate a reference to the statute defining it as a crime).

[98] . G.S. 20-4.01(49).

[99] . *Id*. § 20-4.01(23).

[100]. *Id.* (providing that the term "motor vehicle" "shall not include mopeds as defined in G.S. 20-4.01(27)d1").

or highway, commission of a covered offense in a public vehicular area does not render the grossly aggravating factor in G.S. 20-179(c)(2) applicable.

In addition to satisfying the elements of G.S. 20-28(a), for the grossly aggravating factor in G.S. 20-179(c)(2) to apply, the defendant's license must be revoked for "an impaired driving revocation under G.S. 20-28.2(a)."

G.S. 20-28.2(a) defines an *"impaired driving license revocation"* as a revocation made under any of the following statutes:

- G.S. 20-13.2: consuming alcohol/drugs or willful refusal by driver under 21
- G.S. 20-16(a)(8b): military driving while impaired
- G.S. 20-16.2: refused chemical test
- G.S. 20-16.5: pretrial civil license revocation
- G.S. 20-17(a)(2): impaired driving or impaired driving in a commercial motor vehicle
- G.S. 20-138.5: habitual impaired driving
- G.S. 20-17(a)(12): transporting open container
- G.S. 20-17.2: court order not to operate (repealed effective December 1, 2006)
- G.S. 20-16(a)(7): impaired driving out of state resulting in N.C. revocation
- G.S. 20-17(a)(1): manslaughter or second-degree murder involving impaired driving
- G.S. 20-17(a)(3): felony involving use of motor vehicle, involving impaired driving
- G.S. 20-17(a)(9): felony or misdemeanor death or serious injury by vehicle involving impaired driving
- G.S. 20-17(a)(11): assault with motor vehicle involving impaired driving
- G.S. 20-28.2(a)(3): The laws of another state and the offense for which the person's license is revoked prohibits substantially similar conduct which if committed in this State would result in a revocation listed under any of the above statutes

The last category of revocations warrants some discussion. G.S. 20-179(c)(2) borrows its definition of an impaired driving revocation from the statutory provisions providing for seizure, impoundment, and forfeiture of motor vehicles driven in the commission of an impaired driving offense by a person with an impaired driving license revocation.[101] Thus, revocation of a person's driver's license by another state for an impaired driving event may render the motor vehicle driven by the person in the commission of an impaired driving offense in North Carolina subject to seizure, impoundment, and forfeiture.[102] Revocation by another state with no corresponding action by the NC DMV likely does not, however, constitute a revocation for purposes of driving while license revoked pursuant to G.S. 20-28(a), which arguably requires a North Carolina order of revocation and notification by NC DMV. The terms "revocation" and "suspension" are defined in G.S. 20-4.01(36) and G.S. 20-4.01(47) to mean "[t]ermination of a licensee's or permittee's privilege to drive . . . for a period of time stated in an order of revocation or suspension." The requirement that the termination be stated in an order of revocation or suspension corresponds to the requirement that the State prove that a defendant had actual or constructive knowledge of the revocation to obtain a conviction under G.S. 20-28(a).[103] While not free from ambiguity, both *revocation* and *suspension* have been interpreted in practice to require an order issued by a North Carolina court or the NC DMV.[104] In light of separate statutory provisions authorizing

[101]. *Id*. § 20-28.2(a).
[102]. *Id*. § 20-28.2(a)(3).
[103]. *See* State v. Atwood, 290 N.C. 266, 271, 225 S.E.2d 543, 545 (1976).
[104]. See LOEB & DRENNAN, MOTOR VEHICLE LAW, cited in full *supra* note 2 , at 84; *see also* N.C. PATTERN JURY

NC DMV to suspend or revoke the driving privileges of nonresidents in the same manner as it may for residents[105] and prohibiting a person from operating under a foreign license while subject to such a revocation order,[106] interpreting G.S. 20-28(a) as applicable only when a North Carolina revocation is in effect best accords with the whole of Chapter 20.

Finally, a person who violates the restrictions of a limited driving privilege issued under G.S. 20-179.3 commits "the offense of driving while . . . license . . . revoked under G.S. 20-28(a)." G.S. 20-179.3(j). Thus, the grossly aggravating factor in G.S. 20-179(c)(2) applies to a person who commits a covered offense while driving in violation of the restrictions of a G.S. 20-179.3 limited driving privilege if the person's driver's license is revoked for an impaired driving revocation.

a. Conviction-Based Revocations. Questions also arise regarding whether a defendant's license is revoked for an impaired driving revocation when the time period set forth for the original revocation pursuant to G.S. 20-19(c1) (one year) or (d) (four years) had expired at the time of the current offense but the defendant's driver's license has not been restored. Whether the grossly aggravating factor in G.S. 20-179(c)(2) applies depends on whether the revocation remains in effect or, instead, whether the defendant simply is deemed unlicensed. If the defendant failed to obtain a certificate of completion for receiving a substance abuse assessment and completing the recommended training or treatment, the revocation period is extended until NC DMV receives the certificate of completion.[107] If the revocation period was extended for this reason at the time the person committed the instant offense, then his or her license was revoked for an impaired driving revocation. The grossly aggravating factor thus applies if the defendant met the other requirements for the offense of driving while license revoked under G.S. 20-28(a) by having driven a motor vehicle on a street or highway knowing that his or her license was revoked.[108] If, however, the defendant had obtained a certificate of completion but simply failed to seek restoration of his or her license, which requires proof of insurance[109] and payment of a $100 restoration fee,[110] then the defendant's license was not revoked at the time of the driving. In such a circumstance, the grossly aggravating factor does not apply. An "indefinite" end date for a driver's license suspension for a conviction of impaired driving under G.S. 20-138.1 noted on a defendant's driving record, accompanied by an asterisk beside the suspension, reflects that the term of revocation applicable under G.S. 20-19 has expired but NC DMV has not received a certificate of completion; thus the revocation continues to be in effect.

b. Civil License Revocations. Similar questions arise when, at the time of the covered offense, the defendant's license was civilly revoked pursuant to G.S. 20-16.5. In most circumstances, it is readily apparent that the grossly aggravating factor applies, since impaired driving license revocations are defined by G.S. 20-28.2(a) to include G.S. 20-16.5 revocations. The analysis is rendered slightly more complicated when the minimum revocation period has expired pursuant to G.S. 20-16.5 but the defendant's license still is revoked because he or she has not paid the fee necessary to end the civil

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INSTRUCTION—CRIM. 271.10 (stating that for jury to find that notice of revocation was given, the State must prove beyond a reasonable doubt that (1) notice was personally delivered, (2) the defendant surrendered license to an official of the court (pursuant to G.S. 20-24(a)), or (3) DMV provided notice by mail in accordance with G.S. 20-48).

[105]. *See* G.S. 20-22(a).

[106]. *See id*. § 20-21.

[107]. *See id*. § 20-17.6(b).

[108]. *See* Shea Denning, "Proving Knowledge of a License Revocation," *North Carolina Criminal Law, UNC School of Government Blog* (Apr. 12, 2010), http://sogweb.sog.unc.edu/blogs/ncclaw/?p=1195.

[109]. G.S. 20-19(k).

[110]. *Id*. § 20-7(i1).

revocation. G.S. 20-28(a1) provides that a person convicted of driving while license revoked for driving while subject to revocation under G.S. 20-16.5 after the minimum revocation period has expired but before reclaiming his or her license is *punished* as if the person has been convicted of the less serious offense of driving without a license. Regardless of the defendant's eligibility for reduced punishment for the offense of driving while license revoked on these facts, however, the underlying offense remains driving while license revoked. Accordingly, the nature of the underlying revocation—a civil license revocation pursuant to G.S. 20-16.5—remains unchanged. Thus, the grossly aggravating factor in G.S. 20-179(c)(2) applies if the defendant commits the current offense and simultaneously satisfies the elements of driving while license revoked while subject to a G.S. 20-16.5 revocation, regardless of the reason the G.S. 20-16.5 revocation remains in place.

c. Previous Impaired Driving Revocations. Questions also arise regarding whether G.S. 20-179(c)(2) applies when a defendant's license is revoked for driving while license revoked while subject to an earlier impaired driving revocation. If the revocation in effect at the time of the instant impaired driving offense was for driving while license revoked (as contrasted with the earlier-entered revocation for an impaired driving offense), the grossly aggravating factor in G.S. 20-179(c)(2) does not apply. This is so because regardless of the reason for which the defendant was revoked at the time he or she committed the earlier offense of driving while license revoked, the revocation in effect at the time of the instant impaired driving offense was pursuant to G.S. 20-28(a), which is not among the "impaired driving license revocations" set forth in G.S. 20-28.2(a). Note, however, that the aggravating factor of driving by the defendant while his or her driver's license was revoked as set forth in G.S. 20-179(d)(4) *does* apply on these facts.

d. NC DMV Records. The status of a person's driver's license may be proved by the driving records maintained by NC DMV.[111] A certified copy of such records is prima facie evidence of a revoked license, and certified copies may be transmitted over the Police Information Network.[112]

e. Double Punishment, but No Double Jeopardy. A defendant whose punishment for a covered offense is enhanced based upon a finding of the grossly aggravating factor for driving at the time of the offense while his or her license was revoked and the revocation was an impaired driving revocation[113] also may be convicted of driving while revoked in violation of G.S. 20-28(a).[114] In similar fashion, a defendant's punishment for a covered offense may be aggravated by his or her conviction under G.S. 20-141.5 of speeding to elude,[115] his or her conviction under G.S. 20-141 of speeding by at least 30 miles per hour over the legal limit[116] or for passing a stopped school bus in violation of G.S. 20-217[117]—an offense for which he or she also may be convicted—when the conduct occurs during the same transaction as the covered offense.[118]

In such circumstances, a question arises as to whether the Double Jeopardy Clause of the Fifth

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[111]. *Id*. § 20-26(b).

[112]. *Id*.

[113]. *Id*. § 20-179(c)(2).

[114]. If the defendant committed the covered offense while driving with a revoked license but the revocation was not an impaired driving revocation, the aggravating factor in G.S. 20-179(d)(4) applies. A defendant subject to this aggravating factor also may be convicted of driving while license revoked in violation of G.S. 20-28(a) for the same conduct.

[115]. G.S. 20-179(d)(6).

[116]. *Id*. § 20-179(d)(7).

[117]. *Id*. § 20-179(d)(8).

[118]. *Id*. § 20-179(d).

Amendment,[119] which secures a person's right to be free from multiple punishments for the same offense,[120] permits the person to be punished additionally for the conduct constituting the aggravating factor while at the same time being punished for the covered offense at an aggravated level. A defendant may argue that when a covered offense is aggravated by conduct that is itself a separate crime or by conviction of a separate crime, that conduct or conviction is an element, and thus a lesser-included offense, of the aggravated covered offense. Because, under the test derived from *Blockburger v. United States*,[121] offenses are the same for double jeopardy purposes if all of the elements of one offense are subsumed in the other,[122] the argument continues that a defendant punished for the covered offense and the aggravating conduct or conviction is receiving multiple punishments for the same offense. The contrary argument is that while aggravating factors may be treated as the functional equivalent of elements for Sixth Amendment purposes, they are not elements for purposes of determining whether the Double Jeopardy Clause bars punishment for both offenses.[123] The United States Supreme Court has not determined whether sentencing factors that must be determined by the jury beyond a reasonable doubt are elements of an offense for purposes of double jeopardy analysis,[124] and no North Carolina court has weighed in on the question.

Even if aggravating factors are elements of an aggravated covered offense for purpose of the Fifth Amendment double jeopardy analysis as well as the Sixth Amendment jury-trial analysis, there still are circumstances in which a defendant may be punished in a single prosecution for an aggravated covered offense and lesser-included offenses. The Double Jeopardy Clause does not prohibit multiple punishments for offenses when one is included within the other under the *Blockburger* test if both are tried at the same time and if the legislature specifically authorizes cumulative punishment for both offenses.[125] Thus, even if the elements of two crimes are the same, a defendant may in a single trial be convicted of and punished for both crimes if it is found that the legislature intended for multiple

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[119]. U.S. CONST. amend. V.

[120]. For further discussion of the double jeopardy bar to prosecution and punishment, see Jessica Smith, NORTH CAROLINA CRIMES: A GUIDEBOOK ON THE ELEMENTS OF CRIME 13 (UNC School of Government, 7th ed. 2012).

[121]. 284 U.S. 299 (1932).

[122]. Offenses are not the same for double jeopardy purposes if each contains an element that is not in the other. *See* United States v. Dixon, 509 U.S. 688 (1993).

[123]. *See* United States v. O'Brien, 560 U.S. 218, 224-25, 130 S. Ct. 2169, 2175 (2010) (explaining that while judge-found sentencing factors cannot increase the maximum sentence a defendant might otherwise receive based purely on the facts found by the jury, subject to this constitutional constraint, whether a given fact is an element of the crime itself or a sentencing factor is a question for the legislature).

[124]. *See* Sattazahn v. Pennsylvania, 537 U.S. 101, 111 (2003) (finding, in the context of determining whether the Double Jeopardy Clause applied to capital sentencing proceedings so as to preclude imposition of the death penalty in a subsequent trial if a jury in an earlier proceeding concludes that the State has failed to prove an aggravating circumstance, "no principled reason to distinguish . . . between what constitutes an offense for purposes of the Sixth Amendment's jury-trial guarantee and what constitutes an 'offense' for purposes of the Fifth Amendment's Double Jeopardy Clause") (plurality op.); *compare* People v. Hogan, 114 P.3d 42 (2004), *cert. denied* (Colo. App. 2005) (holding that second degree kidnapping, when enhanced by a factor of aggravated robbery, does not require that separate conviction for the aggravated robbery be merged into the kidnapping conviction and declining to construe plurality opinion in *Sattazahn* as a constitutional mandate that any fact increasing the maximum penalty becomes an essential element of the offense for both double jeopardy and merger purposes), *and* State v. Stephenson, 195 S.W.3d 574 (Tenn. 2006) (holding that the plurality opinion in *Sattazahn* cannot be read to hold that aggravating circumstances must be included as elements of the offense of capital murder for purposes of *Blockburger*), *with* Thomas v. Commonwealth, No. 2003-CA-000166-MR, 2004 WL 405951 (Ky. Ct. App. Mar. 5, 2004) (unpublished) (concluding that DUI was a lesser included offense of driving while license suspended for DUI and that offenses were the same under *Blockburger*).

[125]. *See* Missouri v. Hunter, 459 U.S. 359 (1983).

punishments to apply.[126] And, while *Missouri v. Hunter* (see note 125) referred to specific authorization for cumulative punishment, the North Carolina Supreme Court has found such authorization in the absence of an explicit statutory rule by examining legislative and judicial history and by inferring that inaction from the legislature constitutes "acquiesce[nce]" as to the conviction and punishment of both crimes in a single trial.[127]

Prior to *Blakely v. Washington*,[128] sentencing factors in G.S. 20-179 were not considered elements of the substantive covered offense. Thus, for example, driving while license revoked was not considered a lesser-included offense of impaired driving aggravated by driving while license revoked, and cumulative punishment frequently was imposed for both offenses. When the General Assembly amended G.S. 20-179 in 2006 to require that aggravating factors be submitted to the fact-finder and proved beyond a reasonable doubt, it did recast the sentencing factors under G.S. 20-179 as elements of a covered offense. The legislature's continued treatment of these aggravators as sentencing factors, the requirement of a separate conviction for certain of the factors without mention of a bar against multiple punishment, and the legislature's inaction in the face of the longstanding view that cumulative punishment under G.S 20-179 is permissible evince the General Assembly's intent to allow for cumulative punishment to be imposed for conviction of an aggravated covered offense and for the aggravating conduct itself.

3. Serious Injury to Another Person Caused by the Defendant's Impaired Driving at the Time of the Offense

The third grossly aggravating factor is serious injury to another person caused by the defendant's impaired driving at the time of the offense.[129] The plain language of the statute makes clear that a person other than the defendant must suffer serious injury for this factor to apply. In the assault context, the state supreme court has stated that serious injury is injury that is serious but falls short of causing death, and has characterized "[f]urther definition" as "neither wise nor desirable."[130] And while the courts similarly have declined to define "serious injury" in the context of G.S. 20-179,[131] they have, contrary to the assault-based definition stated above, concluded that it may be based upon injuries so serious as to result in death.[132]

The courts have identified several relevant factors for purposes of assault prosecutions that may guide

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[126]. State v. Gardner, 315 N.C. 444, 340 S.E.2d 701 (1986).

[127]. *Gardner*, 315 N.C. at 462, 340 S.E.2d at 713.

[128]. 542 U.S. 296 (2004).

[129]. G.S. 20-179(c)(3). A person who unintentionally causes serious injury to another person while engaged in the offense of impaired driving under G.S. 20-138.1 or impaired driving in a commercial vehicle under G.S. 20-138.2 where the impaired driving offense is the proximate cause of the other's serious injury commits the offense of felony serious injury by vehicle, a Class F felony. See *id*. § 20-141.4(a3).

[130]. State v. Jones, 258 N.C. 89, 91, 128 S.E.2d 1, 3 (1962).

[131]. *See* State v. Barber, 93 N.C. App. 42, 49, 376 S.E.2d 497, 501 (1989) (finding serious injury based upon the victim's (1) treatment for a cut on the heel and for a broken right leg, (2) hospitalization for blood clots in his lungs and for a compressed vertebra, (3) more than $8,000 in medical expenses, and (4) absence from work due to his injuries).

[132]. State v. Speight, 186 N.C. App. 93, 100, 650 S.E.2d 452, 457 (2007) (finding "overwhelming and uncontroverted" evidence supporting the aggravating factor of serious injury under G.S. 20-179(c)(3) where the defendant, who was driving while impaired, crossed the median and crashed head-on into a vehicle heading in the opposite direction, killing both of its occupants).

the determination of whether serious injury has been inflicted.[133] Those factors, which likewise appear applicable to determining whether a covered offense has caused serious injury, include, but are not limited to, pain and suffering, loss of blood, hospitalization, and time lost from work.[134] Any one of the factors is sufficient by itself to constitute substantial evidence of serious injury.[135] Thus, whether a serious injury has been inflicted depends upon the facts of each case[136] and is generally for the jury to decide under appropriate instructions.[137]

G.S. 20-179 does not address whether more than one grossly aggravating factor exists if more than one person other than the defendant is seriously injured as a result of the defendant's impaired driving. The specification in G.S. 20-179(c)(1) that each qualifying prior conviction counts as a separate grossly aggravating factor and the lack of any similar statement with respect to this factor, along with the other grossly aggravating factors, may indicate that only one grossly aggravating factor of a given type applies for a single covered offense regardless of how many separate occurrences might constitute that type of grossly aggravating factor. On the other hand, one might argue that the legislature's reference to a serious injury to "another person" rather than serious injury to *another person or other persons* evinces its intent for application of a separate grossly aggravating factor for each person seriously injured.

4. Driving by the Defendant While a Child, Person with the Mental Capacity of a Child, or a Disabled Person Was in the Vehicle

The fourth and final grossly aggravating factor for offenses committed after December 1, 2011, is commission of a covered offense with any of the following persons in the vehicle: (1) a child under the age of 18; (2) a person with the mental development of a child under 18; or (3) a person with a physical disability that prevents the person from getting out of the vehicle without assistance.[138] For covered offenses committed December 1, 2011, or later, Level One punishment is required if this factor is found.

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[133]. State v. McLean, 211 N.C. App. 321, 325, 712 S.E.2d 271, 275 (2011).

[134]. *Id*.

[135]. *Id*. (citing State v. Bagley, 183 N.C. App. 514, 526, 644 S.E.2d 615, 623 ("Substantial evidence of a serious injury that is sufficient to survive a motion to dismiss includes, but is not limited to, evidence of 'hospitalization, pain, blood loss, and time lost at work.'"); State v. Joyner, 295 N.C. 55, 65, 243 S.E.2d 367, 374 (1978) ("Evidence that the victim was hospitalized is not necessary for the proof of serious injury.")).

[136]. *See* State v. Ferguson, 261 N.C. 558, 135 S.E.2d 626 (1964) (finding sufficient evidence to submit element of serious injury to the jury based upon evidence that the defendant, in a pickup truck, rammed the back of an automobile driven by the victim, causing him to suffer a whiplash injury that prevented the victim from turning his head without pain and "caused pains to run down his back into the back of his legs," injuries for which the victim was not hospitalized); State v. Field, 75 N.C. App. 647, 331 S.E.2d 221 (1985) (court ruled on constitutionality of judge determining grossly aggravating factor, finding it constitutional, a holding since overruled by *Blakely v. Washington*, 541 U.S. 296 (2004); judge found serious injury based on (1) injury to one person consisting of a severe cut to the head requiring twenty-nine stitches and fractures of the knee that required surgery and (2) injury to another person consisting of a blow to the head and a broken nose, requiring surgery and a skin graft to cover a hole in the membrane).

[137]. *See* State v. James, 321 N.C. 676, 365 S.E.2d 579 (1988) (stating general standard and finding evidence that defendant shot victim with a rifle and that victim was hospitalized as a result of injuries received during the assault sufficient to go to the jury on the element of "serious injury"); *see also McLean*, 211 N.C. App. at 326, 712 S.E.2d at 276 (holding that trial judge's failure to give North Carolina Pattern Jury Instruction—Crim. 120.12, defining "serious injury" as an injury that "causes great pain and suffering," was not error as the appellate courts have chosen not to narrowly define "serious injury" in the context of assaults).

[138]. G.S. 20-179(c)(4).

It is unclear whether more than one grossly aggravating factor exists if more than one qualifying child, person with the mental capacity of a child, or disabled person is in the vehicle at the time of the offense. G.S. 20-179(c)(4), like subdivision (c)(3), discussed above, is silent on the matter. Before this factor was amended and broadened, effective for offenses committed on or after December 1, 2011, it applied if the defendant drove with a child under the age of 16 in the vehicle.[139] Then, as now, the statute did not specify whether the presence of more than one child supported the finding of more than one aggravating factor. Some experts interpreted the former version of the factor to have singular application regardless of the number of children in the vehicle[140] since this subdivision, unlike G.S. 20-179(c)(1), was silent on the matter.[141] As with the grossly aggravating factor for serious injury to another, discussed above, a contrary argument may be made based on the subdivision's reference to "a child" or "a person." One might contend that had the legislature intended one factor to apply regardless of the number of children or disabled persons present in the vehicle, the subdivision would contain the plural form of those nouns.

The amendment of the grossly aggravating factor to render it applicable, for offenses committed on or after December 1, 2011, when a person from one of three distinct categories is present in the vehicle at the time of the offense further complicates matters. The court of appeals has construed "especially reckless or dangerous driving"—an aggravating factor in G.S. 20-179(d)(2), which is similarly worded in the disjunctive—to permit a finding of two separate aggravating factors, one based on especially reckless driving, the other based on especially dangerous driving.[142] The court of appeals in *State v. Mack*[143] explained that "there would need to be at least one item of evidence not used to prove either an element of the offense or any other factor in aggravation to support each additional aggravating factor."[144] If *Mack*'s reasoning were applied to G.S. 20-179(c)(4), as amended, it would allow for the determination of more than one grossly aggravating factor based on the presence of more than one person in the car, each of whom satisfied a separate category. So, for example, a finding of one grossly aggravating factor under G.S. 20-179(c)(4) would be appropriate for a defendant who committed a covered offense with more than one child under the age of 18 in the vehicle. And if a person with a qualifying disability or a person with the mental development of a child under the age of 18 years also was present in the vehicle, a separate grossly aggravating factor would apply. As discussed above, whether more than one grossly aggravating factor under G.S. 20-179(c)(4) may apply based on the presence of individuals within the same category remains unsettled.

B. Aggravating Factors

There are nine aggravating factors, eight of them defined and a ninth "catch-all" aggravating factor. Except for the fifth factor (which involves prior convictions), the conduct constituting the aggravating factor must occur during the same transaction or occurrence as the impaired driving offense.

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[139]. *Id*. § 20-179(c)(4) (2009).

[140]. LOEB & DRENNAN, MOTOR VEHICLE LAW, cited in full *supra* note 2, at 85; see also Jeff Welty, "DWI for the Whole Family," *North Carolina Criminal Law, UNC School of Government Blog* (June 15, 2009), http://sogweb.sog.unc.edu/blogs/ncclaw/?p=428.

[141]. *See supra* § III.A.3 (discussing this argument in the context of the serious injury to another factor codified in G.S. 20-179(c)(3)).

[142]. *See* State v. Mack, 81 N.C. App. 578, 345 S.E.2d 223 (1986).

[143]. *Id*.

[144]. *Id*. at 585, 345 S.E.2d at 227.

In district court, the judge determines whether an aggravating factor exists. With the exception of the fifth aggravating factor set forth below, in superior court the jury determines whether any factor exists. The judge in superior court determines whether the fifth aggravating factor applies, as this involves the determination of a prior conviction.[145] Any aggravating factor, whether found by the judge in district court or the jury or judge in superior court, must be entered in writing on the court's determination of sentencing factors form or some comparable document.[146] As previously mentioned, the State bears the burden of proving beyond a reasonable doubt that any aggravating factor exists.[147]

The aggravating factors are set forth below as subsections (1)–(9).

1. Gross Impairment of the Defendant's Faculties While Driving or an Alcohol Concentration of 0.15 or More within a Relevant Time after the Driving

"Gross impairment" is a high level of impairment, higher than that impairment which must be shown to prove the offense of DWI.[148] No minimum alcohol concentration is required to prove gross impairment. Given that there is no bright line marking "where 'impairment' ends and 'gross impairment' begins," the determination of whether a defendant is grossly impaired depends on the facts of each individual case.[149] The court of appeals in *State v. Harrington*[150] found sufficient evidence of gross impairment where the defendant had an alcohol concentration of 0.14, drove erratically, was unsteady on his feet, had slurred speech, had difficulty answering routine questions, and could not satisfactorily perform any field sobriety tests. The court in *State v. Gunter*[151] found sufficient evidence of gross impairment based on an alcohol concentration of 0.27, the defendant's slurred speech and difficulty standing, and the defendant's asking for the whereabouts of a woman who was not present.

For purposes of determining whether a defendant has an alcohol concentration of 0.15 or more within a relevant time after the driving, the results of a chemical analysis[152] "presented at trial or sentencing" are sufficient proof.[153] Moreover, such results are deemed "conclusive" and are not subject to modification, even by order of the court.[154] The term "presented" is not defined by statute, though one might reasonably construe the provision to deem conclusive only those results that are admitted into evidence at trial or sentencing. Under this view, chemical analysis results that are suppressed pursuant to a trial judge's conclusion that the State violated the defendant's statutory or constitutional rights[155] in

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[145]. G.S. 20-179(c).

[146]. *Id*. § 20-179(c1). AOC-CR-311, the "Impaired Driving Determination of Sentencing Factors" form, is reprinted in Appendixes D and E (the first applies to offenses committed before December 1, 2011, the second to offenses committed on or after December 1, 2011).

[147]. G.S. 20-179(a)(1).

[148]. State v. Harrington, 78 N.C. App. 39, 46, 336 S.E.2d. 852, 856 (1985).

[149]. *Id*. at 46, 47, 336 S.E.2d at 856.

[150]. 78 N.C. App. 39, 336 S.E.2d 852.

[151]. 111 N.C. App. 621, 628, 433 S.E.2d 191, 195 (1993).

[152]. A chemical analysis is defined as "[a] test or tests of the breath, blood, or other bodily fluid or substance of a person to determine the person's alcohol concentration or presence of an impairing substance, performed in accordance with G.S. 20-139.1, including duplicate or sequential analyses." G.S. 20-4.01(3a).

[153]. *Id*. § 20-179(d)(1).

[154]. *Id*.

[155]. *See* State v. Shadding, 17 N.C. App. 279, 194 S.E.2d 55 (1973) (holding that the State's failure to offer evidence regarding whether the defendant was advised of his implied consent rights rendered results of breath test inadmissible); *see also* G.S. 15A-974(a)(1) (providing for the suppression of evidence if its exclusion is required

obtaining the evidence do not conclusively establish a defendant's alcohol concentration for purposes of this aggravating factor. Likewise, under this view, chemical analysis results that are excluded from trial or sentencing on evidentiary or Confrontation Clause grounds do not conclusively establish this factor.[156]

2. Especially Reckless or Dangerous Driving

The State may prove both especially reckless and especially dangerous driving in connection with a single covered offense.[157] If it does so, two aggravating factors are present.[158] To prove two factors in connection with a single offense, at least one item of evidence not used to support an element of the offense or any other aggravating factor must be present. Moreover, because impaired driving itself is a reckless and dangerous act, to establish this factor the State must prove excessive aspects of recklessness or of dangerousness not normally present in the offense of impaired driving.[159] Falling asleep at the wheel while driving, as the result of an impairing substance, has been found to be especially dangerous.[160] Driving into a telephone pole without braking while speeding has been found to be especially reckless.[161]

3. Negligent Driving that Led to a Reportable Accident

A "reportable crash" is one that results in (1) a person's injury or death, (2) property damage of at least $1,000, or (3) property damage to a vehicle seized pursuant to G.S. 20-28.3 for forfeiture in an impaired driving case.[162] A crash is any event that results in injury or property damage attributable directly to the motion of a motor vehicle or its load.[163] For this factor to be present, the accident must have occurred during the same act of driving as the impaired driving offense for which the defendant is being sentenced.

4. Driving by the Defendant While His or Her Driver's License Was Revoked

Unlike the related grossly aggravating factor in G.S. 20-179(c)(2), this factor apparently does not require proof of each element of driving while license revoked under G.S. 20-28, though it is not clear precisely what the State may prove short of a violation of G.S. 20-28(a) to establish this factor.[164] In addition, this

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by the federal or state constitution).

[156]. *See* State v. Hurt, 702 S.E.2d 82 (2010) (holding that the Confrontation Clause applies to sentencing proceedings where a jury determines facts that, if found, increase the defendant's sentence beyond the statutory maximum); see also Jamie Markham, "Confrontation Rights Apply at Sentencing in Noncapital Cases," *North Carolina Criminal Law, UNC School of Government Blog* (Nov. 23, 2010), http://nccriminallaw.sog.unc.edu/?p=1771; Shea Denning, "What's Blakely Got to Do with It? Sentencing in Impaired Driving Cases after Melendez-Diaz," *North Carolina Criminal Law, UNC School of Government Blog* (July 24, 2009), http://sogweb.sog.unc.edu/blogs/ncclaw/?p=567.

[157]. State v. Mack, 81 N.C. App. 578, 584–85, 345 S.E.2d 223, 227 (1986).

[158]. *Id*.

[159]. *Id*.

[160]. *Id.* at 585, 345 S.E.2d at 227.

[161]. State v. Gunter, 111 N.C. App. 621, 628, 433 S.E.2d 191, 195 (1993).

[162]. G.S. 20-4.01(33b).

[163]. *Id*. § 20-4.01(4b). "The terms collision, accident, and crash, and their cognates are synonymous." *Id*.

[164]. *Cf.* State v. Dewalt, 209 N.C. App. 187, 190-92, 703 S.E.2d 872, 875–76 (2011) (interpreting the aggravating factor of "[d]riving when the person's drivers license is revoked" set forth in G.S. 20-141.5(b)(5) for purposes of elevating the misdemeanor offense of speeding to elude arrest to a felony offense pursuant to G.S. 20-141.5 not to require proof of driving on a street or highway, as required by G.S. 20-28(a), because driving while license revoked,

factor applies when the defendant commits a covered offense while driving while his or her license is revoked for something other than an impaired driving revocation.

5. A Specified Conviction Record

For the aggravating factor in G.S. 20-179(d)(5) to apply, the defendant must have a driving record consisting of:

(a) two or more prior convictions of a motor vehicle offense not involving impaired driving that require the assessment of at least three driver's license points;[165]

(b) two or more prior convictions of a motor vehicle offense not involving impaired driving that, standing alone, would require or authorize NC DMV to revoke the person's license;

(c) one conviction described in (a) and one conviction described in (b); or

(d) one or more prior convictions of an offense involving impaired driving that occurred more than seven years before the date of the offense for which the defendant is being sentenced, thus making the conviction(s) too remote to qualify as grossly aggravating factors.

For purposes of (a), (b), or (c) above, the final conviction date of the qualifying conviction must have been within five years of the date of the covered offense. The statute does not specify whether those convictions must occur within the five years immediately *preceding* the commission of the covered offense or whether they may occur after commission of the covered offense. The former interpretation appears to have been the view historically shared and arguably is the most straightforward reading of the statute.[166]

6. Conviction under G.S. 20-141.5 of Speeding by the Defendant While Fleeing or Attempting to Elude Apprehension

Pursuant to G.S. 20-141.5, it is a Class 1 misdemeanor to operate a motor vehicle on a street, highway, or public vehicular area while fleeing or attempting to elude a law enforcement officer who is in the lawful performance of his or her public duties. If two or more specified aggravating factors are present at the time of the offense, or if the violation causes the death of another person, the offense is elevated

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unlike several other aggravating factors listed in G.S. 20-141.5(b), did not incorporate a reference to the statute defining it as a crime); *see also* Shea Denning, "State v. Dewalt and Speeding to Elude," *North Carolina Criminal Law, UNC School of Government Blog* (Jan. 12, 2011), http://sogweb.sog.unc.edu/blogs/ncclaw/?p=1872.

[165]. Three driver's license points are assigned for conviction of any of the following offenses:

a. Running through a stop sign
b. Speeding in excess of 55 miles per hour
c. Failing to yield right of way
d. Running through red light
e. No driver's license or license expired more than one year
f. Failure to stop for siren
g. Driving through safety zone
h. No liability insurance
i. Failure to report accident where such report is required
j. Speeding in a school zone in excess of the posted school zone speed limit
k. Any moving violation committed while driving a commercial motor vehicle

G.S. 20-16(c).

[166]. LOEB & DRENNAN, MOTOR VEHICLE LAW, cited in full *supra* note 2, at 87.

to a Class H felony.[167] If there are two qualifying aggravating factors and a death, the offense is a Class E felony.[168] Speeding more than 15 miles per hour over the speed limit and speeding in a school or work zone are among the aggravating factors that may lead to an offense elevation,[169] though speeding is not an element of the misdemeanor offense. The reference to "speeding" in G.S. 20-179(d)(7) likely is a reference to the caption of G.S. 20-141.5, "Speeding to elude arrest; seizure and sale of vehicles," and not a requirement that speeding be proved for the factor to apply.

For this aggravating factor to apply, the defendant must have been convicted of a violation of G.S. 20-141.5 based upon conduct that occurred during the commission of the covered offense.

7. Conviction under G.S. 20-141 of Speeding by the Defendant by at Least 30 mph over the Legal Limit

This aggravating factor applies when the defendant has been convicted of speeding at least 30 miles over the speed limit and the speeding occurred in the commission of the covered offense.

A person can violate the speed restrictions that apply on North Carolina roads in one of three ways: (1) by driving at a speed greater than is reasonable and prudent under existing conditions; (2) by exceeding maximum speed limits; or (3) by operating a vehicle at less than a minimum posted speed.[170] Generally speaking, speeding is an infraction—a noncriminal violation of the law—punishable by a penalty of not more than $100. Driving on a highway at a speed of more than 15 miles per hour over the speed limit or over 80 miles per hour, however, is a Class 2 misdemeanor, punishable by up to 60 days imprisonment, depending upon the person's prior record level.

Charges involving the second variety of speeding (which is commonly referred to as exceeding the posted speed) require only a determination of whether the person drove a vehicle on a highway in excess of the maximum speed limit by driving more than 15 miles per hour or by driving more than 80 miles per hour, in which case the person committed a misdemeanor criminal offense. Otherwise, the offense is an infraction.

In practice, however, in many speeding cases involving charges of exceeding the maximum speed, the process of stating the charges and the determination of the person's responsibility (in the case of an infraction) or guilt (in the case of a misdemeanor) is far more precise. The citation issued to a defendant often specifies the rate of speed. When a defendant pleads guilty to a speeding charge in which the specific speed is alleged, the defendant pleads not just to speeding but to driving a specific speed in a specific speed zone. If a defendant is found guilty or responsible in district court for a violation of G.S. 20-141, the judge may find the defendant guilty or responsible not only for speeding but also for driving a particular speed, which, again, is a determination that may have collateral licensure and insurance consequences. The same holds true for the jury in superior court.

8. Passing a Stopped School Bus in Violation of G.S. 20-217

[167]. G.S. 20-141.5(b), (b1).
[168]. *Id*. § 20-141.5(b1).
[169]. *Id*. §§ 20-141.5(b)(1), (6).
[170]. *Id*. § 20-141.

The driver of any vehicle who approaches a school bus that is displaying its mechanical stop signal or flashing red light and is stopped to receive or discharge passengers must stop and remain stopped until after the mechanical stop signal has been withdrawn, the flashing red stoplights have been turned off, and the bus has started to move.[171] An exception applies for the driver of a vehicle traveling in the opposite direction from a school bus on a divided roadway.[172] This aggravating factor applies to a defendant who passes a stopped school bus in the commission of a covered offense; there is no requirement that the defendant be charged with or convicted of violating G.S. 20-217.

9. Any Other Factor that Aggravates the Seriousness of the Offense

The final aggravating factor, the so-called "catch-all," must involve conduct that occurred during the same transaction or occurrence as the covered offense.[173] It may apply, for example, when the driver behaves uncooperatively or is belligerent upon being stopped.

IV. Mitigating Factors

Mitigating factors are set forth in subsections (1)–(7) of G.S. 20-179. There are eight mitigating factors (one is set forth in G.S. 20-179(e)(6a)), including a catch-all factor. The judge in both district and superior courts determines the existence of any mitigating factor. The defendant bears the burden of proving by a preponderance of the evidence that a mitigating factor exists. Except for the factors in subdivisions (4), (6), (6a), and (7), the conduct constituting the mitigating factor must occur during the same transaction or occurrence as the covered offense.

A. List of Mitigating Factors by Reference to G.S. 20-179(e) Subdivisions

1. Slight Impairment of the Defendant's Faculties, Resulting Solely from Alcohol, and an Alcohol Concentration that Did Not Exceed 0.09 at any Relevant Time after the Driving

In some ways this factor is analogous to the first aggravating factor, but it varies in one significant way. Unlike the aggravating factor, which is present if a judge determines a person to be grossly impaired even if his or her alcohol concentration is under 0.15, this factor may not be found if the person's alcohol concentration is more than 0.09. Put another way, the 0.15 alcohol concentration is not a minimum level for aggravation, but the 0.09 alcohol concentration is a maximum level for mitigation. No one with an alcohol concentration above 0.09 can be deemed slightly impaired as a matter of law. In addition, the impairment must be solely from alcohol for this factor to be present.

2. Slight Impairment of the Defendant's Faculties, Resulting Solely from Alcohol, with No Chemical Analysis Having Been Available to the Defendant

This factor and mitigating factor (1), above, are mutually exclusive. If one is present, the other is not. For this factor to be present, no chemical analysis must have been available to the defendant. A defendant who willfully refuses a chemical analysis may not claim the benefit of this factor. If drug impairment is

[171]. *Id*. § 20-217(a).
[172]. *Id*. § 20-217(c).
[173]. *Id*. § 20-179(d)(9).

present, this factor may not be found.

3. Driving at the Time of the Offense that Was Safe and Lawful Except for the Impairment of the Defendant's Faculties

Though there are no appellate court cases considering this factor, apparently it would apply if the defendant was stopped at a checkpoint or, perhaps, was pulled over for a registration violation, and no faulty driving was observed. It is less certain whether the factor would apply if, for instance, the defendant was stopped for an equipment violation such as the failure to have an operational brake light, a violation that creates a safety hazard unrelated to the driver's impairment. Because *lawful* driving is required, this factor apparently may not be found when a violation of the rules of the road[174] other than impaired driving has been proved.

4. A Safe Driving Record

For purposes of this mitigating factor, a safe driving record is defined as having (a) no conviction for any offense requiring the assessment of four or more driver's license points or (b) no conviction that would require or authorize NC DMV to revoke the person's license.[175]

Convictions for the following offenses carry four or more driver's license points:[176]

Passing a stopped school bus
Aggressive driving
Reckless driving
Hit and run, property damage only
Following too close
Driving on the wrong side of the road
Illegal passing
Failure to yield the right of way to a pedestrian pursuant to G.S. 20-158(b)(2)b.
Failure to yield the right of way to a bicycle, motor scooter, or motorcycle

In addition, convictions for the following offenses for violations that occur while operating a commercial motor vehicle carry four or more driver's license points:[177]

Rail-highway crossing violation
Careless and reckless driving in violation of G.S. 20-140(f)
Speeding in violation of G.S. 20-141(j3)
Running through a stop sign
Speeding in excess of 55 miles per hour
Failing to yield the right of way
Running through a red light
No driver's license or license expired more than one year
Failure to stop for a siren
Driving through a safety zone

[174]. Part 10 of G.S. Chapter 20 governs the "Operation of Vehicles and Rules of the Road."
[175]. G.S. 20-179(e)(4).
[176]. *Id*. § 20-16(c).
[177]. *Id*.

No liability insurance
Failure to report an accident where such report is required
Speeding in a school zone in excess of the posted school zone speed limit
Possessing alcoholic beverages in the passenger area of a commercial motor vehicle

Only offenses that have a final conviction date occurring within five years of the date of the current covered offense may be considered in determining whether this factor is present. As with G.S. 20-179(d)(5), the statute fails to specify whether it encompasses only those convictions occurring in the five years immediately *preceding* the commission of the covered offense or whether convictions that occur *subsequent to* the commission of the covered offense also qualify. The former interpretation appears to have been the view historically shared and arguably is the most straightforward reading of the statute.[178]

There are some circumstances in which both the "safe driving" mitigating factor and the aggravating factor in G.S. 20-179(d)(5) based upon a defendant's record of traffic convictions will apply. For example, the mitigating factor would apply in the case of a defendant with ten prior convictions for speeding 65 miles per hour in a 55 mile per hour zone—convictions that result in the assessment of three driver's license points each but which, standing alone, cannot result in license revocation. Because each conviction requires the assessment of three driver's license points, the aggravating factor in G.S. 20-179(d)(5) also would apply.

The safe driving mitigating factor and the aggravating factor in G.S. 20-179(d)(5) are mutually exclusive in their application to convictions for which a defendant's driver's license is subject to revocation. No such conviction satisfies that prong of the mitigating factor. One such conviction precludes application of the mitigating factor. Two or more such convictions render the aggravating factor present.

On occasion, a defendant who has never been licensed and for whom NC DMV has no record of convictions will claim that this mitigating factor applies. No appellate court has considered this issue. Nevertheless, construing the "safe driving record" mitigator as applicable to a person who has no official driving record arguably contradicts the legislature's apparent desire to mitigate punishment for drivers with demonstrably safe driving histories.

5. Impairment of the Defendant's Faculties, Caused Primarily by a Lawfully Prescribed Drug for an Existing Medical Condition, and the Amount of Drug Taken Was within the Prescribed Dosage

While the fact that a person committed the offense of impaired driving while impaired by alcohol or a drug that he or she was legally entitled to use is not a defense to a charge of impaired driving,[179] a defendant's impairment from a prescribed dose of a drug lawfully prescribed for a medical condition is a mitigating factor at sentencing.[180]

6. Voluntary Submission to a Substance Abuse Assessment and Treatment

This factor applies if a defendant, after being charged with the covered offense, voluntarily submits to a

[178]. LOEB & DRENNAN, MOTOR VEHICLE LAW, cited in full *supra* note 2, at 87.
[179]. G.S. 20-138.1(b).
[180]. *Id*. § 20-179(e)(5).

mental health facility for treatment and, if recommended by the facility, voluntarily participates in the recommended treatment. There is no requirement that the defendant have completed treatment by the date of sentencing for the mitigating factor to apply, though the defendant must have participated in any treatment or education required up to the time of sentencing. The court of appeals in *State v. Gunter*[181] determined that the mitigating factor was not satisfied by the defendant's obtaining of a substance abuse assessment the day before sentencing for which he had not yet participated in treatment.[182]

The mitigating factor does not require that the assessment be performed by an individual authorized to conduct a substance abuse assessment under G.S. 20-17.6.[183] If, however, a defendant desires the voluntary assessment to double as the mandatory assessment required after conviction, as a condition of both probation and restoration of a driver's license, the assessment must be performed by a qualified individual.[184]

6a. Completion of a Substance Abuse Assessment, Compliance with Its Recommendations, and 60 Days of Continuous Abstinence from Alcohol Consumption, as Proven by a Continuous Alcohol Monitoring (CAM) System

This factor requires completion of a substance abuse assessment and compliance with its recommendations, as is required for mitigating factor (6), above, and contains the additional requirement that the defendant simultaneously maintain sixty days of continuous abstinence from alcohol consumption, as proven by a continuous alcohol monitoring (CAM) system. A CAM system is "a device that is worn by a person that can detect, monitor, record, and report the amount of alcohol within the wearer's system over a continuous 24-hour daily basis."[185] For its use to establish this mitigating factor, the system must be of a type approved by the Division of Adult Correction.[186]

7. Any Other Factor that Mitigates the Seriousness of the Offense

This factor is similar to the catch-all aggravating factor, with one notable exception: It is not limited to conduct that occurred during the commission of the covered offense.[187] The universe of qualifying conduct is, however, limited to conduct that in some way mitigates the seriousness of the offense.

It is not a mitigating factor that the driver of the vehicle was suffering from alcoholism, drug addiction,

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[181]. 111 N.C. App. 621, 433 S.E.2d 191 (1993).

[182]. *Id*. at 627, 433 S.E.2d at 195.

[183]. G.S. 20-17.6 requires that the substance abuse assessment be conducted by one of the entities authorized by the Department of Health and Human Services to conduct assessments. The following individuals are authorized to conduct such assessments: (1) a certified substance abuse counselor; (2) a licensed clinical addiction specialist; (3) a person licensed by the North Carolina Medical Board or the North Carolina Psychology Board; (4) a physician certified by the American Society of Addiction Medicine. *See id*. § 122C-142.1(b1).

[184]. *Id*. § 20-17.6(c). G.S. 20-17.6 does not specifically authorize pretrial assessments to satisfy the requirement for a post-conviction assessment. Nevertheless, many courts, as well as the Department of Health and Human Services, consider qualified pretrial assessments as satisfying this requirement.

[185]. *Id*. § 15A-1343.3; *see also* Ames Alexander, *DWI Tool Is Curbed in NC*, NEWS & OBSERVER, Aug. 13, 2010, www.newsobserver.com/2010/08/13/v-print/626823/dwi-tool-is-curbed-in-nc.html, (describing technology and chronicling past controversy regarding use of CAM.).

[186]. G.S. 20-179(e)(6a).

[187]. *See id*. § 20-179(e)(7).

diminished capacity, or mental disease or defect.[188] Evidence of these matters may be received at the sentencing hearing, however, and used by the judge to formulate the terms and conditions of a sentence under the applicable punishment level.

V. Levels of Punishment

As noted earlier, G.S. 20-179 sets forth six levels of punishment applicable to covered offenses committed December 1, 2011, or later: Aggravated Level One, Level One, Level Two, Level Three, Level Four, and Level Five. As with earlier sections, the discussion that follows is applicable to offenses committed on or after this date unless otherwise specified. A summary of the six levels of punishment and the sanctions applicable for each may be found in Appendix B. A summary of the five punishment levels and their accompanying sanctions for offenses committed before December 1, 2011, is set forth in Appendix C.

A. Aggravated Level One

Aggravated Level One punishment is the most severe of the punishments applicable to a covered offense. If three or more grossly aggravating factors apply for a covered offense committed December 1, 2011, or later, the judge must impose punishment at the Aggravated Level One level (hereinafter Level A1).[189] A defendant sentenced at Level A1 may be fined up to $10,000 and must be sentenced to a term of imprisonment that includes a minimum term of not less than 12 months and a maximum term of not more than 36 months. The term of imprisonment may be suspended only if a condition of special probation is imposed to require the defendant to serve a term of imprisonment of at least 120 days. If the defendant is placed on probation, the judge must require as a condition of probation that the defendant (1) abstain from alcohol consumption for a minimum of 120 days to a maximum of the term of probation, as verified by a continuous alcohol monitoring (CAM) system and (2) obtain a substance abuse assessment and the education or treatment required by G.S. 20-17.6.

A defendant sentenced at Level A1 is not eligible for parole.[190] However, the defendant must be released to post-release supervision four months before the expiration of his or her maximum term.[191] During this four-month period of post-release supervision, the defendant must abstain from alcohol consumption, as verified by a CAM system.[192] As noted in the earlier discussion of the mitigating factor for abstinence from alcohol, a CAM system is "a device that is worn by a person that can detect, monitor, record, and report the amount of alcohol within the wearer's system over a continuous 24-hour daily basis."[193] The system used must be of a type approved by the Division of Adult Correction.[194]

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[188]. *Id*. § 20-179(f).

[189]. For covered offenses committed before December 1, 2011, Level One is the most severe level of punishment and must be imposed when at least two grossly aggravating factors are present.

[190]. G.S. 20-179(f3).

[191]. *Id.* (providing that a Level A1 defendant, upon release, must be supervised by the Section of Prisons of the Division of Adult Correction under and subject to the post-release supervision provisions of G.S. Chapter 15A, Article 84A).

[192]. *Id.*

[193]. *See supra* note 185.

[194]. G.S. 20-179(f3), (h1).

As explained later in this chapter,[195] defendants sentenced to a term of imprisonment for a covered offense are eligible to have their sentences reduced by good time credit. State corrections regulations award credit to persons "convicted of Driving While Impaired" at the rate of one day of credit for each day spent in custody without a violation, and Level A1 sentences are not explicitly excepted from these provisions.[196] The mitigating effect of such credit is limited by G.S. 20-179(p)(2), which provides that good time credit cannot reduce a defendant's term of imprisonment below the mandatory minimum term of imprisonment.[197] The relationship between good time credit and the date for release to post-release supervision of Level A1 offenders is unclear.

An example may help to illustrate the difficulty in applying good time credit and post-release supervision provisions to Level A1 sentences. Suppose a defendant convicted of impaired driving is sentenced at Level A1 to a term of imprisonment of 18 months. The defendant is eligible for one day of credit for each day served in custody without an infraction, resulting in a possible 9 months of good time credit. However, pursuant to G.S. 20-179(p)(2), good time credit cannot reduce the sentence below the mandatory minimum period, which, in this case, is 12 months. It is possible that this defendant may, nevertheless, be released before the expiration of 12 months. Recall the post-release supervision provisions described earlier, which require that a Level A1 defendant be released to post-release supervision four months before the end of the "maximum imposed term of imprisonment." What is the maximum imposed term? Eighteen months? Or the 12 months that result after accounting for good time credit? If it is the latter, then (assuming a full award of good time credit) G.S. 20-179(f3) would appear to require that this defendant be released to post-release supervision after serving 8 months of his or her sentence.[198] If it is the former, then the defendant would not be eligible for release until serving 14 months (four months before the end of the 18-month term imposed at sentencing), though this interpretation would deny the defendant the full benefit of good time credit. This result might be justified on the basis that the regulations are inconsistent with the statutory scheme.

The North Carolina Attorney General's Office has opined in an advisory letter to the general counsel for the Department of Public Safety that "no sentence credits are available" to a defendant sentenced at Aggravated Level One.[199] The attorney general reasons that "[t]he exclusion of Aggravated Level One impaired driving offenses from parole indicates the legislature's intent that no sentence credits apply" and that an "offender is simply released on post-release supervision four months before completion of the maximum term."[200]

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[195]. *See infra* § VIII.B.2.

[196]. *See* STATE OF NORTH CAROLINA, DEPARTMENT OF CORRECTION, DIVISION OF PRISONS, POLICY & PROCEDURE MANUAL, Ch. B. (Inmate Conduct Rules, Discipline), Sec. .0100 (Sentence Credits) (issue date 5/31/11), www.doc.state.nc.us/dop/policy_procedure_manual/b0100.pdf.

[197]. G.S. 20-179(p)(2).

[198]. It is not entirely clear, however, that a defendant may be released to post-release supervision before serving the mandatory minimum term of imprisonment. See Jamie Markham, "Post-Release Supervision for Aggravated Level One DWI Offenders," *North Carolina Criminal Law, UNC School of Government Blog* (July 28, 2011) http://sogweb.sog.unc.edu/blogs/ncclaw/?p=2735 (contrasting G.S. 20-179(f3)'s directive that a defendant "shall be released" four months from the maximum with G.S. 20-179(p)(2)'s statement that a defendant "shall serve the mandatory minimum period of imprisonment").

[199]. Advisory Letter from Assistant Attorney General Elizabeth Parsons and Special Deputy Attorney General Joseph Finarelli to Casandra White, General Counsel, North Carolina Department of Public Safety 2 (June 27, 2012) (on file with author).

[200]. *Id*. at 3.

B. Level One

For covered offenses committed before December 1, 2011, Level One was the most severe level of punishment, and it applied whenever there were at least two grossly aggravating factors. For covered offenses committed on or after December 1, 2011, Level One punishment applies if the grossly aggravating factor under G.S. 20-179(c)(4) (child, person with the mental capacity of a child, or disabled person in vehicle) is found[201] or if two other grossly aggravating factors apply.[202] A defendant sentenced to Level One punishment may be fined up to $4,000 and must be sentenced to a term of imprisonment that includes a minimum term of at least 30 days and a maximum term of not more than 24 months. The term of imprisonment may be suspended only if a condition of special probation is imposed to require the defendant to serve a term of imprisonment of at least 30 days. If a defendant is placed on probation, the judge must require as a condition of probation that the defendant obtain a substance abuse assessment and the education or treatment required by G.S. 20-17.6.[203] For offenses committed December 1, 2011, the judge also may impose a condition of probation requiring that the defendant abstain from alcohol consumption for a minimum of 30 days to a maximum of the term of probation as verified by a CAM system.[204]

1. Amendments Effective December 1, 2012

For covered offenses committed on or after December 1, 2012, and sentenced at Level One, a judge may "reduce the minimum term of imprisonment required to a term of not less than 10 days if a condition of special probation is imposed to require that a defendant abstain from alcohol consumption and be monitored by a continuous alcohol monitoring system, of a type approved by the Division of Adult Correction of the Department of Public Safety, for a period of not less than 120 days."[205] If a defendant is monitored on an approved CAM system during the pretrial period, up to 60 days of pretrial monitoring may be credited against the 120-day monitoring requirement for probation.[206] The reference to 10 days as the minimum term of imprisonment, rather than the *minimum term of imprisonment that must be imposed as a condition of special probation*, gives rise to a question about whether a judge may satisfy the mandatory statutory sentencing provisions in G.S. 20-179(g) by imposing a 10-day sentence that is suspended on the condition that the defendant abstain from alcohol consumption and submit to CAM for 120 days. This seems unlikely to have been the legislature's intent. First, the authorization for a sentence suspended on these conditions appears directly after the authorization for suspension of a

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[201]. If, for an offense committed December 1, 2011, or later, the grossly aggravating factor in G.S. 20-179(c)(4) is found along with two or more additional grossly aggravating factors, Level A1 punishment is required.

[202]. G.S. 20-179(g).

[203]. *Id*.

[204]. *Id*. § 20-179(h1). The defendant's abstinence from alcohol must be verified by a CAM system of a type approved by the Division of Adult Correction. *Id.* For offenses committed on or after December 1, 2007, but before December 1, 2011, the maximum period for which CAM could be imposed was 60 days. *See* G.S. 20-179(h1) (2009); S.L. 2007-165. Other provisions, repealed for offenses committed on or after December 1, 2011, limited the total cost of CAM to the defendant to $1,000 and prohibited CAM if the court found that the defendant should not be required to pay for it unless the costs were paid by the local government entity responsible for the defendant's incarceration. *See* G.S. 20-179(h1), (h2) (2009); S.L. 2011-191.

[205]. S.L. 2012-146 (H 494), *as amended by* S.L. 2012-194 (S 847) (amending G.S. 20-179(g)) (July 12, 2012); see also Shea Denning, "Authorization for Continuous Alcohol Monitoring Expanded by S.L. 2012-146," *North Carolina Criminal Law, UNC School of Government Blog* (July 17, 2012), http://nccriminallaw.sog.unc.edu/?p=3726.

[206]. S.L. 2012-146, cited in full immediately above.

sentence on condition that a term of imprisonment of at least 30 days be imposed as a condition of special probation. Second, if the 10 days refers to the underlying minimum term of imprisonment rather than a minimum period of imprisonment as a condition of special probation, Level One punishment can be satisfied by a defendant's service of 10 days of imprisonment upon his or her refusal to abstain from alcohol, be monitored by CAM, or comply with any other condition of probation. Finally, such a construction would fail to account for the General Assembly's use of the term "special probation," a term defined by G.S. 15A-1351 as a type of probationary sentence in which the court requires, among other conditions, that the defendant submit to a period or periods of imprisonment at times and intervals within the period of probation.[207] Because it seems nearly certain that the legislature intended for the alcohol-abstinence and CAM condition to be coupled with a requirement that the defendant serve 10 days of imprisonment as a condition of special probation, Appendix A to this bulletin reflects this interpretation.

A court may not impose CAM pursuant to G.S. 20-179(g) if it finds good cause that the defendant should not be required to pay the costs of CAM "unless the local governmental entity responsible for the incarceration of the defendant in the local confinement facility agrees to pay the costs of the system."[208]

C. Level Two

For offenses committed on or after December 1, 2011, the judge must impose Level Two punishment if only one grossly aggravating factor applies and it is not the factor set forth in G.S. 20-179(c)(4).[209] For offenses committed before December 1, 2011, Level Two punishment is required whenever only one grossly aggravating factor is present.[210] A defendant subject to Level Two punishment may be fined up to $2,000 and must be sentenced to a term of imprisonment that includes a minimum term of not less than 7 days and a maximum term of not more than 12 months. The term of imprisonment may be suspended only if a condition of special probation is imposed to require the defendant to serve a term of imprisonment of at least 7 days.[211] If a defendant is placed on probation, the judge must require as a condition of probation that the defendant obtain a substance abuse assessment and the education or treatment required by G.S. 20-17.6.[212] For offenses committed on or after December 1, 2011, the judge also may impose a condition of probation requiring that the defendant abstain from alcohol consumption for a minimum of 30 days to a maximum of the term of probation, as verified by a CAM system.[213]

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[207]. *See* G.S. 15A-1351(a). It bears noting, however, that the General Assembly used the term "special probation" elsewhere in S.L. 2012-146 to refer to a probationary sentence for a Level Two offender that did not require periods of imprisonment. *See infra* § V.C.1.

[208]. G.S. 20-179(k4); *see* S.L. 2012-146 (H 494), *as amended by* S.L. 2012-194 (S 847) (enacting new G.S. 20-179(k4), effective for offenses committed on or after December 1, 2012) (July 12, 2012).

[209]. G.S. 20-179(c).

[210]. *Id*.

[211]. *Id*. § 20-179(h).

[212]. *Id.*

[213]. *Id*. § 20-179(h1). The defendant's abstinence from alcohol must be verified by a CAM system of a type approved by the Division of Adult Correction. *Id*. For offenses committed on or after December 1, 2007, but before December 1, 2011, the maximum period for which CAM could be imposed was 60 days. *See* G.S. 20-179(h1) (2009); S.L. 2007-165. Other provisions, repealed for offenses committed on or after December 1, 2011, limited the total cost of CAM to the defendant to $1,000 and prohibited CAM if the court found that the defendant should not be required to pay for it unless the costs were paid by the local government entity responsible for the defendant's incarceration. *See* G.S. 20-179(h1), (h2) (2009); S.L. 2011-191.

1. Amendments Effective October 1, 2013

Federal law requires that a portion of federal highway funds that would otherwise be apportioned to a state be reserved from a state that has not enacted a repeat intoxicated driver law.[214] Such laws must require that a person convicted of a second impaired driving offense be required to perform at least 30 days of community service or be imprisoned for at least five days. A person convicted of a third or subsequent impaired driving offense must be required to perform at least sixty days of community service or serve at least ten days of imprisonment. The North Carolina legislature amended G.S. 20-179(h) in 2013 to satisfy these minimum requirements.

For covered offenses committed on or after October 1, 2013, G.S. 20-179(h) (level two punishment for various DWI convictions) provides that if the defendant is subject to level two punishment based on grossly aggravating factors in G.S. 20-179(c)(1) (prior conviction) or (c)(2) (driving while license revoked for an impaired driving revocation), the prior DWI conviction occurred within five years before the date of the offense for which the defendant is being sentenced, and the judge suspends all active terms of imprisonment and imposes abstention from alcohol as verified by a continuous alcohol monitoring system, then the judge must also impose as a special probation condition that the defendant must complete 240 hours of community service.[215]

2. Amendments Effective December 1, 2012

For covered offenses committed on or after December 1, 2012, and sentenced at Level Two, a judge may suspend the sentence if he or she imposes a condition of special probation requiring that the defendant serve a term of imprisonment of at least 7 days or that the defendant "abstain from consuming alcohol for at least 90 consecutive days, as verified by a continuous alcohol monitoring system, of a type approved by the Division of Adult Correction of the Department of Public Safety."[216] If the defendant is monitored on an approved CAM system during the pretrial period, up to 60 days of pretrial monitoring may be credited against the 90-day monitoring requirement for probation.[217]

A court may not impose CAM pursuant to G.S. 20-179(h) if it finds good cause that the defendant should not be required to pay the costs of CAM "unless the local governmental entity responsible for the incarceration of the defendant in the local confinement facility agrees to pay the costs of the system."[218]

D. Level Three

Level Three punishment is required if the judge determines that the aggravating factors "substantially

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[214] 23 U.S.C. § 164(a)(4), (b)(2).

[215] S.L. 2013-348 (S 659).

[216]. S.L. 2012-146 (H 494), *as amended by* S.L. 2012-194 (S 847) (amending G.S. 20-179(h)) (July 12, 2012). As noted earlier, see *supra* § V.B.1, a probationary sentence that does not require service of a term of imprisonment is not "special probation" as that term is defined in G.S. 15A-1351. Thus, a condition requiring that a defendant abstain from alcohol consumption for 90 days, as verified by CAM, that is not coupled with a requirement that the defendant serve intervals of imprisonment is more appropriately characterized as a *special condition of probation* rather than as "special probation."

[217]. S.L. 2012-146 (H 494), *as amended by* S.L. 2012-194 (S 847) (amending G.S. 20-179(h)) (July 12, 2012).

[218]. G.S. 20-179(k4); *see* S.L. 2012-146 (H 494), *as amended by* S.L. 2012-194 (S 847) (enacting new G.S. 20-179(k4), effective for offenses committed on or after December 1, 2012).

outweigh" the mitigating factors.[219] A defendant subject to Level Three punishment may be fined up to $1,000 and must be sentenced to a term of imprisonment that includes a minimum term of not less than 72 hours and a maximum term of not more than 6 months.[220] The term of imprisonment may be suspended but must include the condition that the defendant (1) be imprisoned for a term of at least 72 hours as a condition of special probation; (2) perform community service for a term of at least 72 hours; or (3) any combination of these conditions.[221]

The Division of Adult Correction of the Department of Public Safety is authorized by G.S. 143B-708 to "conduct a community service program" to provide oversight of offenders ordered to perform community service as a condition of probation for criminal violations, "including driving while impaired violations under G.S. 20-138.1."[222] The program assigns offenders to perform service in the local community. Each defendant who participates in the program must pay a $250 fee.[223]

The community service program for persons sentenced under G.S. 20-179(i), (j), or (k) formerly was codified in G.S. 20-179.4, which made clear that the community service requirements for covered offenses had to be served under the supervision of community service coordinators as part of the statutorily prescribed program. G.S. 20-179.4 was repealed in 2009,[224] and references to the community service program for impaired driving offenders were combined with provisions governing the Department of Correction's community service program for all offenders.[225] The provisions were again recodified in 2011[226] in G.S. 143B-708, which provides:

> The Division of Adult Correction of the Department of Public Safety may conduct a community service program. The program shall provide oversight of offenders placed under the supervision of the Section of Community Corrections of the Division of Adult Correction and ordered to perform community service hours for criminal violations, including driving while impaired violations under G.S. 20‑138.1. This program shall assign offenders, either on supervised or on unsupervised probation, to perform service to the local community in an effort to promote the offender's rehabilitation and to provide services that help restore or improve the community. The program shall provide appropriate work site placement for offenders ordered to perform community service hours. The Division may adopt rules to conduct the program. Each offender shall be required to comply with the rules adopted for the program.[227]

The repeal of G.S. 20-179.4 has given rise to an argument that while "community service" under G.S. 20-179 may be satisfied by service performed pursuant to the statewide community service program, qualifying community service also may be performed outside of the program. This issue arises most often in the case of defendants who reside outside of North Carolina and who are sentenced to

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[219]. G.S. 20-179(f)(1).
[220]. *Id*. § 20-179(i).
[221]. *Id*.
[222]. *Id*. § 143B-708(a).
[223]. *Id*. § 143B-708(c).
[224]. S.L. 2009-372.
[225]. *See* G.S. 143B-262.4 (2009) (providing that the Department of Correction may conduct a community service program that "shall provide oversight of offenders placed under the supervision of the Division of Community Corrections and ordered to perform community service hours for criminal violations, including driving while impaired violations under G.S. 20-138.1").
[226]. *See* S.L. 2011-145.
[227]. *See* G.S. 143B-708(a).

probation at Levels Three, Four, or Five. For obvious practical reasons, many such defendants would prefer to avoid returning to North Carolina to satisfy community service requirements.[228] It seems unlikely that the recodification of the community service references in 2009 and 2011 reflects the legislature's intent to eliminate the longstanding requirement that community service be performed through the community service program. Moreover, covered offenses are subject to the probation provisions of Article 82 of Chapter 15A, which include, as a special condition of probation, "community or reparation service under the supervision of the Section of Community Corrections of the Division of Adult Correction,"[229] further indicating that community service as a condition of probation means community service under the program established pursuant to G.S. 143B-708.

If a defendant sentenced at Level Three is placed on probation, the judge must require as a condition of probation that the defendant obtain a substance abuse assessment and the education or treatment required by G.S. 20-17.6.[230]

E. Level Four

Level Four punishment is required if the judge determines that there are no aggravating and mitigating factors or that aggravating factors are "substantially counterbalanced by mitigating factors."[231] A

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[228]. And for equally obvious reasons, such defendants frequently prefer community service to jail—the other condition that can satisfy the requirements for a suspended sentence.

[229]. G.S. 15A-1343(b1)(6).

[230]. *Id*. § 20-179(i).

[231]. *Id*. § 20-179(f)(1). The court of appeals in *State v. Green*, 209 N.C. App. 669, 681, 707 S.E.2d 715, 724 (2011), characterized Level Four punishment as "tantamount to a sentence within the presumptive range;" thus, the *Green* court determined that no *Blakely* error (see the section entitled "Introduction," *supra*, for further context) occurred when the defendant was punished at Level Four based on the trial court's finding of an aggravating factor not found by the jury. *Green* cited as support structured sentencing cases noting that a trial court may sentence anywhere within the presumptive range without findings other than those in the jury verdict. *Id.* at ___, 707 S.E.2d at 723 (citing State v. Norris, 360 N.C. 507, 513, 630 S.E.2d 915, 918–19 (2006); State v. Hagans, 177 N.C. App. 17, 31–32, 628 S.E.2d 776, 778 (2006). Nevertheless, the treatment of mitigating factors under G.S. 20-179 differs in an important respect from their treatment under structured sentencing. In a structured sentencing case, a judge may, but is not required to, impose a sentence within the mitigated range upon finding that mitigating factors are present and are sufficient to outweigh any aggravating factors. In contrast, under G.S. 20-179(f)(3), a judge must impose a Level Five sentence if he or she determines that the mitigating factors substantially outweigh any aggravating factors. As noted above, Level Four punishment is prescribed only if there are no aggravating or mitigating factors or aggravating factors are substantially counterbalanced by mitigating factors. Thus, at a sentencing hearing for a covered offense involving one or more mitigating factors, a judge's consideration of an aggravating factor not found by the jury does, in fact, expose a defendant to enhanced punishment under G.S. 20-179.

The court of appeals recognized this distinction in State v. Geisslercrain, __ N.C. App. ___, ___ S.E.2d ___ (April 1, 2014). The *Geisslercrain* court explained that when only aggravating factors are present, the trial court must impose a Level Three punishment; when only mitigating factors are present, the trial court must impose a Level Five punishment; and when no aggravating or mitigating factors are present or such factors substantially counterbalance one another, the trial court must impose a Level Four punishment. *Geisslercrain* held that the trial court erred in sentencing the defendant to Level Four punishment based on a single aggravating factor that was found by the judge and not the jury as required by Blakely v. Washington, 542 U.S. 296 (2004), and G.S. 20-179 itself. The appellate court explained that given the absence of any properly found aggravating factors, the trial court "had no discretion but to sentence Defendant to a Level Five punishment." Geisslercrain, ___ N.C. App. at ___, ___ S.E.2d at ___.

defendant subject to Level Four punishment may be fined up to $500 and must be sentenced to a term of imprisonment that includes a minimum term of not less than 48 hours and a maximum term of not more than 120 days.[232] The term of imprisonment may be suspended but must include the condition that the defendant (1) be imprisoned for a term of 48 hours as a condition of special probation; (2) perform community service for a term of 48 hours; or (3) any combination of these conditions.[233] Note that the conditions of probation for a Level Four sentence, unlike Levels A1 through Three, specify the precise number of hours that must be served as a condition of special probation or for which community service must be performed. Those hours may not be raised or lowered by the judge.[234]

If a defendant sentenced at Level Four is placed on probation, the judge must require as a condition of probation that the defendant obtain a substance abuse assessment and the education or treatment required by G.S. 20-17.6.[235]

F. Level Five

Level Five punishment is required when the mitigating factors substantially outweigh any aggravating factors.[236] A defendant subject to Level Five punishment may be fined up to $200 and must be sentenced to a term of imprisonment that includes a minimum term of not less than 24 hours and a maximum term of not more than 60 days.[237] The term of imprisonment may be suspended on condition that the defendant: (1) be imprisoned for a term of 24 hours as a condition of special probation; (2) perform community service for a term of 24 hours; or (3) any combination of those conditions.[238]

If a defendant sentenced at Level Five is placed on probation, the judge must require as a condition of probation that the defendant obtain a substance abuse assessment and the education or treatment required by G.S. 20-17.6.[239]

G. Aider and Abettor Punishment

As a rule, a person who aids and abets another to commit a covered offense is him or herself guilty of the principal offense.[240] However, because the sentencing factors are focused on the conduct of the driver, they are difficult to apply to a person convicted of a covered offense as an aider and abettor. Accordingly, G.S. 20-179 provides that a person convicted of impaired driving under G.S. 20-138.1 under the common law concept of aiding and abetting is subject to Level Five punishment.[241] In such a case, the judge need make no findings of grossly aggravating, aggravating, or mitigating factors.[242]

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[232]. G.S. 20-179(j).
[233]. *Id*.
[234]. *See* State v. Magee, 75 N.C. App. 357, 330 S.E.2d 825 (1985).
[235]. G.S. 20-179(j).
[236]. *Id*. § 20-179(f)(3).
[237]. *Id*. § 20-179(k).
[238]. *Id*. §§ 20-179(k)(1)–(4).
[239]. *Id*. § 20-179(k).
[240]. For a general discussion of the common law concept of aiding and abetting, see Jessica Smith, *North Carolina Sentencing after* Blakely v. Washington *and the* Blakely *Bill*, cited in full *supra* note 68, at 31–34.
[241]. G.S. 20-179(f1). Note that Section 20-179(f1) applies only to the covered offense of impaired driving under G.S. 20-138.1.
[242]. *Id*.

VI. Probationary Sentences

A. Incidents of Probation

Any lawful condition of probation may be imposed under any level of punishment for a covered offense.[243] Among the permissible conditions of probation is that the defendant "[s]atisfy any other conditions determined by the court to be reasonably related to his rehabilitation."[244] Courts have substantial discretion in devising conditions under this section.[245] The appellate courts have upheld conditions of probation in impaired driving cases preventing the person from driving,[246] preventing the defendant from being present during certain hours at an establishment licensed to sell alcoholic beverages,[247] and preventing the defendant from using, possessing, or consuming alcohol.[248] One condition traditionally imposed and previously sanctioned by the court of appeals—mandatory participation in a Twelve-Step program such as Alcoholics Anonymous or Narcotics Anonymous[249]—has been held unconstitutional by several federal courts of appeals on the basis that it violates the First Amendment's clause prohibiting the establishment of religion.[250]

B. Continuous Alcohol Monitoring

For covered offenses committed on or after December 1, 2011, continuous alcohol monitoring (CAM) is required as a condition of probation under Aggravated Level One[251] and is authorized as a condition of probation for Level One and Level Two punishment.[252] For covered impaired driving offenses committed on or after December 1, 2012, new G.S. 20-179(k2) permits a judge to order "as a condition of special probation" for any level of punishment under G.S. 20-179 that "the defendant abstain from alcohol consumption, as verified by a continuous alcohol monitoring system, of a type approved by the Division of Adult Correction of the Department of Public Safety."[253] As noted earlier, the reference to alcohol abstinence and CAM as a "condition of special probation" does not square with the meaning ascribed to the term "special probation" in G.S. 15A-1351.[254]

In addition, for covered offenses committed on or after December 1, 2012, G.S. 20-179(k3) permits a court in its sentencing order to authorize a probation officer to require a defendant to submit to CAM

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[243]. *Id*. §§ 20-179(f3), (g), (h), (i), (j), (k); *see id*. § 15A-1343 (setting out permissible conditions of probation).

[244]. *Id*. § 15A-1343(b1)(10).

[245]. State v. Harrington, 78 N.C. App. 39, 48, 336 S.E.2d 852, 857 (1985).

[246]. State v. Smith, 233 N.C. 68, 62 S.E.2d 495 (1950) (upholding condition preventing a person from driving on the highways for 12 months); State v. Cooper, 304 N.C. 180, 282 S.E.2d 436 (1981) (upholding condition preventing a probationer from operating a motor vehicle during certain hours).

[247]. *Harrington*, 78 N.C. App. at 48, 336 S.E.2d at 857.

[248]. State v. James, 166 N.C. App. 761, 604 S.E.2d 366 (2004).

[249]. State v. McGill, 114 N.C. App. 479, 483–84, 442 S.E.2d 166, 168 (1994).

[250]. See Jamie Markham, "Does Mandatory AA/NA Violate the First Amendment," *North Carolina Criminal Law, UNC School of Government Blog* (Oct. 16, 2009), http://sogweb.sog.unc.edu/blogs/ncclaw/?p=784&print=1.

[251]. G.S. 20-179(f3).

[252]. *Id*. § 20-179(h1).

[253]. G.S. 20-179(k2); *see* S.L. 2012-146 (H 494), *as amended by* S.L. 2012-194 (S 847) (enacting new G.S. 20-179(k2), effective for offenses committed on or after December 1, 2012) (July 12, 2012).

[254]. See *supra* § V.B.1.

for assessment purposes if the defendant is required, as a condition of probation, not to consume alcohol and the probation officer believes the defendant is consuming alcohol.[255] If the probation officer orders the defendant to submit to CAM pursuant to this provision, the defendant must bear the costs of CAM.[256]

A court may not impose CAM pursuant to G.S. 20-179(k2) or (k3) if it finds good cause that the defendant should not be required to pay the costs of CAM "unless the local governmental entity responsible for the incarceration of the defendant in the local confinement facility agrees to pay the costs of the system."[257]

C. Limits on Special Probation

While each level of punishment under G.S. 20-179 requires that probationary sentences contain specified conditions— including, in the case of Levels A1, One, and Two, a mandatory term of imprisonment as a condition of special probation—G.S. 20-179 does not specify the maximum term of imprisonment that may be imposed as a condition of special probation. That limitation is established by G.S. 15A-1351(a), which requires that "[f]or probationary sentences for 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."[258] This rule differs from that applicable in structured sentencing, which limits a period of special probation to no more than one-fourth of the sentence imposed.[259] It is not entirely clear whether the maximum penalty allowed by law under G.S. 15A-1351(a) is the maximum for any level of impaired driving (3 years, which would result in a 9-month maximum period of special probation) or the maximum penalty for the level at which the defendant was convicted. The latter interpretation seems the one most likely intended by the legislature as, under the former interpretation, the limitation imposed by G.S. 15A-1351(a) would exceed the statutory maximum for covered offenses sentenced at Levels Three, Four, or Five.[260]

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[255]. G.S. 20-179(k3); *see* S.L. 2012-146 (H 494), *as amended by* S.L. 2012-194 (S 847) (enacting new G.S. 20-179(k3), effective for offenses committed on or after December 1, 2012).

[256]. *Id.*

[257]. G.S. 20-179(k4); *see* S.L. 2012-146 (H 494), *as amended by* S.L. 2012-194 (S 847) (enacting new G.S. 20-179(k4), effective for offenses committed on or after December 1, 2012).

[258]. The Criminal Procedure Act is peppered with exceptions for "impaired driving under G.S. 20-138.1," like this one, which generally are interpreted to apply to all covered offenses. *See* G.S. 15A-1351(a) (setting forth permissible periods of confinement for special probation "[f]or probationary sentences for impaired driving under G.S. 20-138.1" that differ from those for other criminal offenses); *id*. § 15A-1351(b) (providing that sentencing for a felony or misdemeanor "other than impaired driving under G.S. 20-138.1" that occurred on or after the effective date of Article 81B is subject thereto); *id*. § 15A-1340.10 (providing that structured sentencing under Article 81B "applies to criminal offenses . . . other than impaired driving under G.S. 20-138.1"). Absent that interpretation, offenses other than impaired driving under G.S. 20-138.1 sentenced under G.S. 20-179 would be subject to provisions of the Structured Sentencing Act that conflict with G.S. 20-179.

[259]. *Id*. § 15A-1351(a). In addition, confinement as a condition of special probation ordered for criminal offenses other than "impaired driving under G.S. 20-138.1" may not be required beyond two years of conviction. *Id*. There is no such time limitation on special probation confinement pursuant to a probationary sentence for "impaired driving under G.S. 20-138.1," a reference that, as discussed *supra* note 256, likely includes all covered offenses sentenced under G.S. 20-179.

[260]. See Jamie Markham, "Sentence Reduction Credits and Parole for DWI Inmates," *North Carolina Criminal Law*, *UNC School of Government Blog* (Jan. 13, 2010), http://sogweb.sog.unc.edu/blogs/ncclaw/?p=988 (stating that construing the "maximum penalty allowed by law for the offense" under G.S. 15A-1371 to mean the

D. Length of Probation

The period of probation initially imposed for a covered offense may not exceed five years.[261] The period may be extended with the consent of the defendant beyond the original period (1) for the purpose of allowing the defendant to complete restitution or (2) to allow the defendant to continue medical or psychiatric treatment ordered as a condition of probation.[262] The period of the extension shall not exceed three years beyond the original period of probation and may be ordered only in the last six months of the original period of probation.[263]

E. Substance Abuse Assessment

When a defendant is sentenced to probation for a covered offense, a substance abuse assessment and completion of recommended education or treatment must be required as a condition of probation.[264] The required assessment and education or treatment for these sentences is the same as that required for a defendant whose license is revoked upon conviction of certain alcohol-related offenses to have his or her driver's license restored after a period of revocation.

These assessments must be completed by facilities authorized by the state Department of Health and Human Services.[265] An assessment consists of a face-to-face clinical interview, administration of an approved standardized test to determine chemical dependency, review of the person's driving record, and verification of the person's alcohol concentration at the time of the offense.[266] After the assessment is completed, the facility recommends the level of service to be completed, which can range in intensity from completion of a 16-hour alcohol and drug education traffic school (ADETS)—the least intensive requirement—to inpatient treatment.[267]

ADETS—the resulting recommendation in 19 percent of the assessments performed in the 2010–11 fiscal year—is recommended if all of the following apply:[268]

- the assessment does not identify a "substance abuse handicap,"
- the person has no previous convictions for impaired driving or driving after consuming while under 21,
- the person's alcohol concentration at the time of the offense is .14 or less,
- the person did not refuse a chemical analysis, and

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maximum punishment for the applicable level of punishment under G.S. 20-179 makes sense in the context of calculating parole eligibility).

[261]. G.S. 15A-1342(a).

[262]. *Id*. § 15A-1342(a).

[263]. *Id*.

[264]. *Id*. §§ 20-179(g), (h), (i), (j), (k).

[265]. *Id*. § 20-17.6(c); 122C-142.1(a).

[266]. Title 10A of the North Carolina Administrative Code (hereinafter N.C.A.C.), chapter 27G, section .3807, subsections (b), (c).

[267]. *See* NORTH CAROLINA DEPARTMENT OF HEALTH & HUMAN SERVICES, DIVISION OF MENTAL HEALTH, DEVELOPMENTAL DISABILITIES AND SUBSTANCE ABUSE SERVICES, DRIVING WHILE IMPAIRED (DWI) SUBSTANCE ABUSE SERVICES REPORT: G.S. 122C-142.1 6 (Feb. 2012) (hereinafter SUBSTANCE ABUSE SERVICES REPORT), www.ncdhhs.gov/mhddsas/statspublications/Reports/reports-generalassembly/generalreports/dwireport2-2012.pdf.

[268]. G.S. 122C-142.1(c); 10A N.C.A.C, ch. 27G, sec. .3813(c)(1).

the person meets certain placement criteria established by the American Society of Addiction Medicine (ASAM).

If the above criteria are not met one of the following four levels of treatment will be recommended (from least to most intensive): short-term outpatient treatment, longer-term outpatient treatment, day treatment/intensive outpatient treatment, or inpatient and residential treatment. The largest percentage of assessments in 2010–11 (48 percent) recommended short-term outpatient treatment.[269]

A person who obtains a substance abuse assessment for purposes of obtaining a certificate of completion for license restoration reasons (see *supra* § III.A.2.a) must pay to the assessing agency a fee of $100.[270] If the person needs more than one certificate of completion, which would be the case if his or her license was revoked for more than one conviction covered by G.S. 20-17.6, the person must pay a $100 fee for each certificate sought, though only one assessment will be performed and a single course of treatment required.[271]

The fee for ADETS is statutorily prescribed at $160.[272] Fees for treatment vary, depending upon the provider and level of treatment. In 2010–11, fees for short-term treatment averaged $357.53 and fees for inpatient treatment averaged $675.14.[273]

F. Limits on Use of Supervised Probation

G.S. 20-179(r) provides that any person convicted of impaired driving and placed on probation must be placed on unsupervised probation if he or she is sentenced at Levels Three through Five, has no impaired driving convictions in the seven years preceding the current offense date, and has been assessed and completed any recommended treatment, unless the judge makes specific findings in the record about the need for probation supervision. If a judge places a convicted impaired driver on supervised probation under this subsection based on a finding that supervised probation is necessary, the judge must authorize the probation officer to transfer the defendant to unsupervised probation after he or she completes any ordered community service and pays any fines.

VII. Appeal

A. Vacating of Sentence

As noted in the discussion about what constitutes a prior conviction, above, the General Assembly in 2006 enacted provisions designed to prevent defendants from manipulating the procedure for appealing district court convictions to superior court in order to escape enhanced punishment based upon prior convictions. G.S. 20-38.7(c), applicable for offenses committed December 1, 2006, or later, provides:

> Notwithstanding the provisions of G.S. 15A‑1431, for any implied‑consent offense that is first tried in district court and that is appealed to superior court by the defendant for a

[269]. *See* SUBSTANCE ABUSE SERVICES REPORT, at 6.
[270]. G.S. 122C-142.1(f1).
[271]. *Id*.
[272]. *Id*.
[273]. See Attachment F to SUBSTANCE ABUSE SERVICES REPORT, cited in full *supra* note 265.

> trial de novo as a result of a conviction, the sentence imposed by the district court is vacated upon giving notice of appeal. The case shall only be remanded back to district court with the consent of the prosecutor and the superior court. When an appeal is withdrawn or a case is remanded back to district court, the district court shall hold a new sentencing hearing and shall consider any new convictions.

The first item of note related to this provision is that it purports to apply to all implied consent offenses, not just to offenses sentenced under G.S. 20-179. This broad application is surprising given that the appeal/sentencing manipulation to which it was addressed occurred in connection with sentencing under G.S. 20-179, which sets forth a graduated punishment scheme that significantly increases a defendant's punishment if the defendant has a qualifying prior conviction. A qualifying prior conviction renders a defendant subject to punishment at Level Two, which requires a minimum term of not less than 7 days and a maximum term of not more than 12 months. Because each qualifying prior conviction counts as a grossly aggravating factor, a defendant with two qualifying prior convictions is subject to punishment at Level One. A defendant with three prior convictions is subject to punishment at Level A1, which requires that the defendant be sentenced to a term of imprisonment that includes a minimum term of not less than 12 months and a maximum term of not more than 36 months. For misdemeanor implied consent offenses sentenced under structured sentencing, the impact of a single prior conviction is far less.[274] Given the impetus for the provision and the reference in G.S. 20-38.7(d) to facts determined by a jury under G.S. 20-179, it is unclear whether the legislature intended for the statute to apply to implied consent offenses other than those sentenced under G.S. 20-179. Furthermore, it is unclear whether the provision ever is applied in practice to implied consent offenses other than covered offenses.

B. Remand for Resentencing

In addition to providing that convictions for implied consent offenses are vacated upon giving notice of appeal, G.S. 20-38.7(c) provides that cases "shall only be remanded back to district court with the consent of the prosecutor and the superior court." This language calls into question whether a defendant who appeals from a district court conviction for an implied consent offense may withdraw the appeal before the case is transferred to superior court without the consent of the prosecutor or the court as a defendant may for other types of district court convictions.[275] The next sentence of G.S. 20-38.7(c) implies that consent may not be necessary in this circumstance as it requires that a new sentencing hearing be held "[w]hen an appeal is withdrawn *or* a case is remanded back to district court."[276] Once an implied consent case appealed to superior court is transferred to that court, it is clear that the prosecutor and the superior court must consent to the remand.[277] At a new sentencing hearing held after an appeal is withdrawn or a case is remanded, the district court must consider any new convictions.[278]

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[274]. *See* G.S. 15A-1340.21(b) (providing that a defendant who has at least one but not more than four prior convictions is at prior conviction level II).

[275]. *See id*. § 15A-1431(c).

[276]. *Id*. § 20-38.7(c) (emphasis added). If a defendant is permitted to withdraw an appeal from a conviction of a covered offense without consent pursuant to G.S. 15A-1431, remand is automatic, though the remand is for resentencing, whereas in structured sentencing cases remand is for execution of the judgment. *See id*. § 15A-1431(g).

[277]. *See id*. § 15A-1431(h) (permitting a defendant to withdraw an appeal after the calendaring of the case for trial de novo in superior court only by consent of the court).

[278]. *Id*. § 20-38.7(c).

C. Appeal from Resentencing

G.S. 20-38.7(d) provides for a limited right to appeal following a new sentencing hearing. It is unclear whether the General Assembly's intent was to allow a defendant to appeal for trial de novo or instead to appeal only the sentence imposed. The statute permits a defendant to appeal to superior court only if (1) the new sentence is based upon additional facts considered by the district court that were not considered in the previously vacated sentence, and (2) the defendant would be entitled to a jury determination of those facts "pursuant to G.S. 20-179."[279] Because the fact of a prior conviction is determined by a judge, not a jury,[280] the finding of a new conviction (that is, a conviction that became final after the date of the earlier sentencing) at the new sentencing hearing does not trigger a statutory right to appeal. In contrast, the finding of another type of fact, such as the presence of a child under the age of 18 in the vehicle at the time of the offense, is a fact for which the defendant has a right to a jury determination. A defendant would, therefore, be statutorily entitled to appeal from a new sentence imposed after remand for a covered offense based upon the court's consideration of such a fact.

Thus, G.S. 20-38.7(d) clearly contemplates that a judge permissibly may impose judgment at a new sentencing hearing based upon factors other than new convictions, regardless of whether those factors were considered in the previously vacated sentence. Notwithstanding the broad language of the statute, a defendant's right to due process may constrain a judge's ability at a new sentencing hearing to find additional sentencing factors that result in a more severe sentence.

D. Due Process Concerns

The United States Supreme Court held in *North Carolina v. Pearce*[281] that the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution requires that vindictiveness against a defendant for having successfully attacked his or her first conviction "must play no part in the sentence he receives after a new trial."[282] Noting that a defendant's exercise of a right to appeal must be "free and unfettered,"[283] *Pearce* reasoned that imposing a heavier sentence upon a defendant for the explicit purpose of punishing the defendant for having succeeded in getting his or her conviction set aside "would be a flagrant violation of the Fourteenth Amendment."[284] And, since fear of such vindictiveness can unconstitutionally deter a defendant's exercise of his or her right to appeal from or collaterally attack a conviction, "due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge."[285] To assure the absence of such motivation, the *Pearce* court adopted a prophylactic rule requiring that "whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear [and] [t]hose reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding."[286] The high Court

[279]. *Id*. § 20-38.7(d).
[280]. *See id*. § 20-179(c).
[281]. 395 U.S. 711 (1969), *overruled on other grounds by* Alabama v. Smith, 490 U.S. 794 (1989) (holding that no presumption of vindictiveness arises when the first sentence was based upon a guilty plea and the second sentence follows a trial).
[282]. *Id.* at 725.
[283]. *Id*. at 724 (internal quotation marks, citations omitted).
[284]. *Id.* at 723–24.
[285]. *Id.* at 725 (footnote omitted).
[286]. *Id*. at 726.

subsequently has limited the applicability of *Pearce*'s prophylactic rule, holding that it does not apply to the imposition of an increased sentence in a trial de novo system,[287] to an increased sentence by a jury upon reconviction after a new trial,[288] or to imposition of a harsher sentence following trial than was imposed pursuant to a guilty plea.[289]

In 1977 the North Carolina General Assembly enacted a statute governing resentencing in superior court after appellate review, G.S. 15A-1335, which embodies generally the rule of *Pearce* but is more restrictive in that it does not allow imposition of a more severe sentence at resentencing based upon aggravating factors that occurred after the date of the original sentence.[290] New sentencing hearings conducted pursuant to G.S. 20-38.7 are not controlled by G.S. 15A-1335 and occur in a procedurally different context from the sentencing at issue in *Pearce* in that resentencing under G.S. 20-38.7 does not follow a new trial or a reversal of the judge's earlier determinations. Instead, a new sentencing hearing follows a defendant's withdrawal of his or her appeal to superior court. Thus, it is not clear that the *Pearce* rule applies in this context.

Nevertheless, the concerns about penalizing a defendant for exercising the right to appeal and about placing the defendant in apprehension of such a retaliatory motivation that underlay the holding in *Pearce* do appear relevant to resentencing under G.S. 20-38.7. Arguably, the possibility of an increased sentence imposed by a district court upon withdrawal of an appeal to superior court could chill the defendant's exercise of that statutory right. And the rationale for the U.S. Supreme Court's determination in *Colten v. Kentucky*[291] that the superior court in a two-tier system may impose a harsher sentence, free of the *Pearce* rule, is that the superior court conducts a trial de novo representing a "fresh determination of guilt or innocence," not an appeal on the record. This distinction does not support a *Pearce* exception for resentencing by the district court.

If *Pearce* is applicable to resentencing under G.S. 20-38.7, and if aggravating factors in impaired driving cases are indeed sentencing factors and not elements of the offense,[292] the district court upon resentencing under G.S. 20-38.7 may make a "fresh determination of the presence in the evidence of aggravating and mitigating factors,"[293] but "in the process of weighing and balancing the factors found"[294] may not impose a sentence greater than the original sentence unless the increase results from a finding of convictions that became final after the date of the initial sentencing.[295] If *Pearce* does not apply, the defendant may receive a harsher sentence upon resentencing, and the defendant's right to appeal is limited by G.S. 20-38.7(d).

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[287]. Colten v. Kentucky, 407 U.S. 104 (1972).

[288]. Chaffin v. Stynchcombe, 412 U.S. 17 (1973).

[289]. Alabama v. Smith, 490 U.S. 794 (1989).

[290]. *See* State v. Mitchell, 67 N.C. App. 549, 551, 313 S.E.2d 201, 202 (1984).

[291]. 407 U.S. 104.

[292]. *Cf.* United States v. O'Brien, 560 U.S. 218, 225, 130 S. Ct. 2169, 2175 (2010) (citations omitted) (noting in context of federal statute that "whether a given fact is an element of the crime itself or a sentencing factor is a question for Congress. When Congress is not explicit, as is often the case because it seldom directly addresses the distinction between sentencing factors and elements, courts look to the provisions and the framework of the statute to determine whether a fact is an element or a sentencing factor.").

[293]. *See Mitchell*, 67 N.C. App. at 551, 313 S.E.2d at 202 (1984).

[294]. *Id*.

[295]. *See* Wasman v. United States, 468 U.S. 559, 569–70 (1984) ("Consideration of a criminal conviction obtained in the interim between an original sentencing and a sentencing after retrial is manifestly legitimate").

Regardless of *Pearce*'s applicability, the district court upon resentencing under G.S. 20-38.7 may impose a harsher sentence without running afoul of due process if that sentence is statutorily mandated.[296] So, for instance, if a defendant sentenced for a Level One DWI initially was sentenced to a term of imprisonment of 15 days, the judge upon resentencing could impose a Level One sentence that required a term of imprisonment of 30 days, the minimum term required by G.S. 20-179(g).

E. Withdrawal of an Appeal following Resentencing

G.S. 20-38.7(d) provides that if a defendant who has the right to appeal from a new sentence imposed in district court upon remand from superior court gives notice of appeal and subsequently withdraws the appeal, the district court must reinstate the sentence as a final judgment that is not subject to further appeal. This provision implies that giving notice of appeal from resentencing in district court vacates the sentence, though this matter is not all together clear since the rule vacating sentences imposed in district court applies to cases appealed to the superior court for trial de novo.[297]

VIII. Service of a Sentence: Jail or Prison, Jail Credit and Parole

A. Jail or Prison

The rules governing the place of confinement for a person sentenced for a violation of Chapter 20 differ slightly from those setting forth the place of confinement for a person sentenced for other criminal offenses. The starting point for determining the place of confinement for a person sentenced to a term of imprisonment for a Chapter 20 offense is G.S. 20-176(c1), which provides:

> Notwithstanding any other provision of law, no person convicted of a misdemeanor for the violation of any provision of this Chapter except G.S. 20‑28(a) and (b), G.S. 20‑141(j), G.S. 20‑141.3(b) and (c), G.S. 20‑141.4, or a second or subsequent conviction of G.S. 20‑138.1 shall be imprisoned in the State prison system unless the person previously has been imprisoned in a local confinement facility, as defined by G.S. 153A‑217(5), for a violation of this Chapter.

Thus, the rule generally applicable to sentences for Chapter 20 offenses is that terms of imprisonment for active sentences, regardless of length, are served in local confinement facilities rather than in the custody of the Division of Adult Correction. This rule does not apply to a defendant who previously has been imprisoned in a local confinement facility for a Chapter 20 offense. The general rule also does not apply to convictions for certain offenses, among them a second or subsequent conviction of driving while impaired in violation of G.S. 20-138.1. None of the other covered offenses are excepted from the generally applicable rule.

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[296]. *See* State v. Branch, 134 N.C. App. 637, 641, 518 S.E.2d 213, 216 (1999) (holding that trial courts have the authority to vacate an invalid sentence and resentence a defendant even if the term of court has ended); *see also* Jessica Smith, *Trial Judge's Authority to Sua Sponte Correct Errors After Entry of Judgment in a Criminal Case*, ADMIN. OF JUST. BULL. No. 2003/02 (UNC Institute of Government, May 2003), www.sog.unc.edu/sites/www.sog.unc.edu/files/aoj200302.pdf.; *cf.* State v. Williams, 74 N.C. App. 728, 329 S.E.2d 709 (1985) (holding that G.S. 15A-1335 did not apply to a situation in which the judge imposed the minimum and presumptive sentence of 14 years at resentencing when the initial sentence was 12 years).

[297]. *See* G.S. 20-38.7(c) (providing that "for any implied-consent offense that is first tried in district court and that is appealed to superior court . . . for a trial de novo . . ., the sentence imposed by the district court is vacated upon giving notice of appeal").

When an exception to the general rule of local confinement in G.S. 20-176(c) applies, G.S. 15A-1352, which governs the appropriate place of confinement for criminal offenses generally, establishes the framework for where a term of imprisonment may or must be served. G.S. 15A-1352(a) provides that a sentence of 90 days or less imposed for a misdemeanor offense must be served in a facility other than one maintained by the Division of Adult Correction (DAC).[298] If the sentence imposed, or, in the case of multiple offenses, the *sentences imposed*, require confinement for more than 180 days, the commitment must be to the custody of the DAC.

A person sentenced to confinement of more than 90 days and up to 180 days for a misdemeanor offense other than "an impaired driving offense under G.S. 20-138.1" or "for nonpayment of a fine under Article 84" of Chapter 15A must be committed to the Statewide Misdemeanant Confinement Program established by G.S. 148-32.1. Under this program, the North Carolina Sheriffs' Association identifies space in local confinement facilities that is available for housing misdemeanants serving periods of confinement of more than 90 and up to 180 days, "except for those serving a sentence for an impaired driving offense."[299] The references to "an impaired driving offense under G.S. 20-138.1" and the term "impaired driving offense" likely encompass all covered offenses sentenced under G.S. 20-179.[300]

Because a person sentenced for a covered offense may not be committed to the Statewide Misdemeanant Confinement Program, a judge has discretion (assuming that an exception to the local confinement rule of G.S. 20-176(c1) applies) to order that a defendant sentenced to a period of confinement of more than 90 and up to 180 days for such an offense be committed to a local confinement facility or a DAC facility.

The rules stated above apply to the place of confinement for active sentences. G.S. 15A-1351(a) governs the incidents of special probation for criminal offenses generally and "impaired driving under G.S. 20-138.1"[301] specifically, providing that noncontinuous periods of imprisonment under special probation may only be served in designated local confinement or treatment facilities. A person imprisoned for continuous periods as a condition of special probation may be confined in a DAC or local confinement facility.[302]

B. Jail Credit

1. Time Served

Generally, the minimum and maximum term of a criminal sentence must 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

[298]. There is an exception for overcrowding, as described in G.S. 148-32.1, which allows a judge to order transfer of a prisoner whose term of imprisonment is 30 days or more to a DAC facility. *Id*. § 148-32.1(b).

[299]. *Id*. § 148-32.1(b1).

[300]. *See supra* note 256 for an explanation of why this reference probably incorporates all covered offenses.

[301]. *See supra* note 256 for an explanation of why this reference probably incorporates all covered offenses.

[302]. *See* G.S. 15A-1351(a).

sentence.[303] An exception applies for covered offenses, barring a defendant from receiving credit for the first 24 hours spent in jail pending trial.[304] This rule precludes the application of credit for such time against either an active term of imprisonment or a term of imprisonment imposed as a condition of special probation.[305] So, for example, a defendant who served 24 hours in jail upon being arrested for a covered offense may not be awarded credit for that time against the minimum period of imprisonment required as a condition of special probation.[306]

Credit for time spent committed or confined as a result of the charge (other than the first 24 hours of incarceration pending trial) may be credited to either the suspended sentence or to the imprisonment required for special probation.[307]

2. Good Time Credit

G.S. 15A-1355(c) provides that "[f]or sentences of imprisonment imposed for convictions of impaired driving under G.S. 20-138.1," a defendant may receive credit toward service of the maximum term and any minimum term of imprisonment and toward eligibility for parole as provided in rules and regulations made under G.S. 148-13.

G.S. 148-13(b) permits the Secretary of Public Safety to issue regulations "[w]ith respect to prisoners who are serving prison or jail terms for impaired driving offenses under G.S. 20-138.1" providing for "deductions of time from the terms of such prisoners for good behavior, meritorious conduct, work or study, participation in rehabilitation programs, and the like." It appears that this reference is intended to refer to all covered offenses sentenced under G.S. 20-179, not simply to the offense of impaired driving under G.S. 20-138.1.[308]

Regulations issued by the Secretary of Public Safety provide that inmates "convicted of Driving While Impaired" are awarded "Good Time at the rate of one day deducted from their prison or jail term for each day they spend in custody without a conviction through the Disciplinary Process of a violation of inmate conduct rules."[309] These credits also are awarded to inmates sentenced as felons for crimes they committed prior to October 1, 1994. A defendant convicted of a covered offense is eligible for good time credit regardless of the place of confinement.[310] No portion of a term of special probation for a covered offense may be reduced by Good Time credit.[311]

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[303]. *Id*. § 15-196.1.
[304]. *Id*. § 20-179(p)(1).
[305]. *Id*. § 20-179(p).
[306]. *Id*. § 20-179(p)(1).
[307]. *Id*. § 15A-1351(a).
[308]. This interpretation accords with construing G.S. Chapter 15A provisions applicable to sentences for impaired driving under G.S. 20-138.1 as controlling all sentences under G.S. 20-179. See *supra* note 256. It also explains the use of the plural "impaired driving offenses" rather than a reference to the singular offense of impaired driving under G.S. 20-138.1.
[309]. *See* STATE OF NORTH CAROLINA, DEPARTMENT OF CORRECTION, DIVISION OF PRISONS, POLICY & PROCEDURE MANUAL (hereinafter POLICY & PROCEDURE MANUAL), Ch. B. (Inmate Conduct Rules, Discipline), Secs. .0100, .0111(a) (Sentence Credits) (issue date 5/31/11), www.doc.state.nc.us/dop/policy_procedure_manual/b0100.pdf.
[310]. *See* G.S. 148-13(b) (authorizing Secretary of Public Safety to issue regulations applicable to "prisoners who are serving prison or jail terms for impaired driving offenses"); POLICY & PROCEDURE MANUAL, cited in full *supra* note 307, Ch. B., Sec. .0111(a) (providing for "Good Time at the rate of one day deducted from . . . prison or jail term").
[311]. G.S. 148-13(f).

C. Credit for Inpatient Treatment

One of the purposes for sentencing for impaired driving, like sentencing generally, is to rehabilitate offenders so that they may be restored to the community as lawful citizens.[312] The rehabilitative aims of the sentencing scheme for impaired driving are evident in the requirement that offenders obtain substance abuse assessments and treatment or education as conditions of probation. They likewise are evident in the provisions of G.S. 20-179(k1) that allow a court to order that a defendant serve a term of special probation as an inpatient at a state-operated or -licensed facility for the treatment of alcoholism or substance abuse. The latter provision accords with structured sentencing provisions that allow a judge to order that a defendant serve a period of special probation at a designated treatment facility.[313] Unlike its structured sentencing counterpart, however, G.S. 20-179(k1) explicitly requires the defendant to bear the expense of any treatment unless the trial judge orders that the costs be absorbed by the State. In ordering a defendant convicted of a covered offense to serve time at a treatment facility, the judge may impose restrictions on the defendant's ability to leave the premises of the treatment facility and may require that the defendant follow the facility's rules.[314]

G.S. 20-179(k1) also permits a judge to "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 provision is subject to a few interpretations. One narrow interpretation is that the clause means simply that when a judge orders that a period of imprisonment imposed as a condition of special probation be served at a treatment facility, the judge may credit this time against any suspended sentence that later is activated. Given that the general rules for crediting time served in a treatment facility only award credit for time spent in a state or local institution,[315] such a provision is necessary to allow for credit when the inpatient time is served in a private facility. Thus, even under this narrow view, G.S. 20-179(k1)'s rules about awarding sentencing credit for inpatient treatment are significantly broader than the rules for awarding such credit to sentences generally, including sentences for offenses involving impaired driving that are not sentenced under G.S. 20-179, such as habitual impaired driving. Yet this relatively restrictive interpretation of subsection (k1) has two flaws. First, it renders surplusage language requiring that the credited treatment occur "after the commission of the offense for which the defendant is being sentenced," since treatment ordered at sentencing always will be completed after the offense. Second, subsection (k1) makes no reference to sentences subsequently activated upon violation of probation, which would be the logical time at which post-sentencing treatment credit would be ordered.

Alternatively, G.S. 20-179(k1) might be interpreted as permitting a judge to award credit for qualifying inpatient treatment at a licensed facility only against a sentence that imposes "active punishment" as that term is defined by G.S. 15A-1340.11—that is, a sentence that requires a term of imprisonment and is not suspended. Another still-yet broader reading, and the view held by the author, is that a defendant

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[312]. *See id*. § 15A-1340.12.

[313]. *See id*. § 15A-1351(a).

[314]. *See id*. § 20-179(k1).

[315]. *See id*. § 15-196.1 (requiring credit against the minimum and maximum term of a sentence for "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."); State v. Stephenson, 213 N.C. App. 621, 623-24, 713 S.E.2d 170, 173 (2011) (holding that the defendant was not entitled to credit in structured sentencing case for time spent at Potter's House, an "independent Christian faith-based rehabilitation program [] not affiliated with or operated by either a State or local government agency").

may receive credit for qualifying inpatient treatment against periods of imprisonment imposed as a condition of special probation as well as against an active sentence. Under this interpretation, the term "active" in the context of G.S. 20-179(k1) refers to a period of imprisonment rather than "active punishment" pursuant to G.S. 15A-1340.11. The pairing of the credit provision in subsection (k1) with authorization for service of a term of imprisonment imposed as a condition of special probation at such a treatment facility provides support for the view that the legislature intended to allow for credit against periods of imprisonment served pursuant to active or probationary sentences. If this interpretation is correct, then credit awarded for qualifying inpatient treatment may satisfy the minimum terms of imprisonment required for active sentences or as a condition of special probation for each level of impaired driving. Thus, a defendant who serves 30 days as an inpatient at a licensed treatment facility after committing an impaired driving offense sentenced at Level One may, in the judge's discretion, be awarded credit for this time against a term of special probation requiring a term of imprisonment of 30 days. In this circumstance, the defendant will not be required to serve any time in jail unless he or she violates conditions of probation and imprisonment is ordered in response to such a violation.

D. Service on Weekends

The judge in his or her discretion may order a term of imprisonment imposed pursuant to G.S. 20-179 to be served on "weekends," even if the sentence cannot be served in consecutive sequence.[316] Active terms of imprisonment for covered offenses as well as special probation may be served in this manner.[317] The statutory reference to "weekends" rather than to "noncontinuous periods" gives rise to a question regarding whether a judge may order that imprisonment be served for noncontinuous periods on days other than Friday through Sunday. Given that weekend service of jail time presumably is permitted to mitigate the disruption of a defendant's work and school schedule, there appears to be no principled reason for adopting a literal construction that would disallow service of noncontinuous periods of imprisonment on weekdays, particularly when such an arrangement is necessary to permit a defendant to complete work and school obligations that occur on weekend days.

If a defendant is ordered to serve 48 hours or more or has 48 hours or more remaining on a term of imprisonment, the defendant must be required to serve 48 continuous hours of imprisonment to be given credit.[318] Credit for jail time may only be awarded hour for hour for time actually served.[319] The jail must maintain a log showing the number of hours served. A defendant who reports to the jail for service of a term of imprisonment with alcohol remaining in his or her body (as shown by an alcohol screening device) or a controlled substance previously consumed (unless lawfully obtained and taken in therapeutically appropriate amounts) must not be allowed to enter the jail and must be reported to the court.[320] If the defendant is reported back to the court for this reason, the court must hold a hearing.[321] If the court determines that at the time of the defendant's entrance to the jail he or she had alcohol

[316]. G.S. 20-179(s).

[317]. While G.S. 15A-1351(a) authorizes a sentence of special probation for any criminal offense to be served "at whatever time or intervals within the period of probation, consecutive or nonconsecutive, the court determines," a court may not order that an active sentence for a structured sentencing offense be served in noncontinuous periods. *See* State v. Miller, 205 N.C. App. 291, 695 S.E.2d 149 (2010). See also Jamie Markham, "Noncontinuous Active Sentences," *North Carolina Criminal Law, UNC School of Government Blog* (July 7, 2010), http://nccriminallaw.sog.unc.edu/?p=1398.

[318]. G.S. 20-179(s).

[319]. *Id*. § 20-179(s)(1).

[320]. *Id*. § 20-179(s)(2).

[321]. *Id*. § 20-179(s)(3).

remaining in his or her body or had a previously consumed controlled substance in his or her body, the defendant must be ordered to serve jail time immediately and is ineligible to serve jail time on weekends.[322] It is a defense to immediate service of jail time and ineligibility for weekend service if the alcohol or controlled substance was lawfully obtained and taken in therapeutically appropriate amounts.[323]

E. Concurrent, Consolidated, and Consecutive Sentences

Under structured sentencing, a judge may consolidate convictions for multiple felony offenses entered at the same time or multiple misdemeanor offenses entered in the same session of court and impose a single judgment that is consistent with the punishment required for the most serious of the consolidated offenses based on the defendant's prior record level.[324] A different rule governs the consolidation of impaired driving offenses sentenced pursuant to G.S. 20-179.

Two or more impaired driving charges may not be consolidated for judgment.[325] So, for example, a defendant convicted of impaired driving in a commercial vehicle in violation of G.S. 20-138.2 and impaired driving in violation of G.S. 20-138.1 must be sentenced for both offenses, even if the convictions arose from a single incident of driving or were entered on the same day. Such sentences may, however, run concurrently. A separate statutory sentencing rule provides that if the conviction for G.S. 20-138.2 and G.S. 20-138.1 arose from the same incident, the aggregate punishment may not exceed the maximum punishment applicable to the offense of impaired driving under G.S. 20-138.1.[326]

Furthermore, for each conviction of impaired driving, save for two exceptions, a judge must determine whether any of the statutory aggravating or mitigating factors that dictate the applicable level of punishment exist. No such finding of factors is required if the defendant's conviction of impaired driving is premised upon the common law concept of aiding and abetting or if the impaired driving charge is consolidated with a charge carrying a greater punishment.[327]

Thus, G.S. 20-179(f2) expressly acknowledges the propriety of consolidating an impaired driving conviction with a charge carrying greater punishment, implicitly authorizing the consolidation of impaired driving convictions subject to sentencing under G.S. 20-179 with convictions subject to greater punishment under the Structured Sentencing Act.[328] Determining whether another conviction carries a greater punishment is complicated by the multiple levels of punishment applicable to impaired driving sentences under G.S. 20-179, each of which carries its own maximum punishment. Perhaps the maximum punishment under G.S. 20-179 is the statutory maximum for the most serious level of DWI (which, for offenses committed on or after December 1, 2011, is 3 years). On the other hand, the

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[322]. *Id*.

[323]. *Id*.

[324]. *See id*. § 15A-1340.15(b) (applicable to sentences for felonies); 15A-1340.22(b) (applicable to sentences for misdemeanors).

[325]. *See id*. § 20-179(f2).

[326]. *Id*. § 20-138.2(e) (so limiting aggregate punishment); *see also id*. § 20-138.3(c) (setting forth a similar limitation for aggregated punishment imposed for a single incident of impaired driving and driving by a person less than 21 after consuming alcohol or drugs, though the latter offense, unlike impaired driving, is subject to structured sentencing).

[327]. *Id*. § 20-179(f2).

[328]. *Cf.* State v. Branch, 134 N.C. App. 637, 641, 518 S.E.2d 213, 216 (1999) (holding that offenses governed by the Fair Sentencing Act could not be consolidated with offenses punished under the Structured Sentencing Act).

maximum may be that applicable to the level at which the defendant is subject to being sentenced, something the court may be unable to determine without finding aggravating and mitigating factors. While jurisprudence prior to *Blakely v. Washington*[329] suggests that the statutory maximum for the most aggravated level of impaired driving establishes the relevant statutory maximum,[330] it is doubtful that the court would reach the same conclusion if the issue were considered today, given the changed constitutional landscape.

Some experts have suggested that notwithstanding the authorization to do so, impaired driving convictions subject to sentencing under G.S. 20-179 should not be consolidated with structured sentencing convictions because different rules govern the calculation of the defendant's release date under the two schemes. Such consolidation across sentencing schemes may not, however, prove problematic so long as the "lead" offense—the greater offense with which the impaired driving conviction is consolidated—is clearly indicated on the judgment. Since the sentencing scheme for the lead offense controls the defendant's service of the sentence, the jail or Division of Adult Correction need only concern itself with the sentencing, credit, and release rules applicable to the lead offense.

A related question is whether a lesser misdemeanor that is not subject to sentencing under G.S. 20-179 may be consolidated with an impaired driving offense sentenced under G.S. 20-179. This practice appears to be permissible, as the judge still would be required to determine whether aggravating and mitigating factors apply and to sentence in accordance with the provisions of G.S. 20-179.

There is no requirement that the sentence for impaired driving run consecutively to a felony sentence being served at the time of the DWI sentencing. G.S. 15A-1354(a), which applies to sentences imposed pursuant to G.S. 20-179 as well as to Structured Sentencing Act sentences, provides that in the absence of a statutory provision requiring a consecutive sentence or specification in the judgment that the sentences are to run consecutively, sentences imposed at the same time or upon a person already subject to an undischarged term of imprisonment run concurrently.

F. Parole

Defendants sentenced to "a term of imprisonment for a conviction of impaired driving under G.S. 20-138.1"[331] are eligible for parole under Article 85 of Chapter 15A. As noted earlier, the most reasonable and consistent construction of the sentencing provisions of Chapter 15A that refer to convictions of impaired driving under G.S. 20-138.1 is that they apply broadly to all convictions sentenced under G.S. 20-179.[332] This section, like the preceding ones, is written based on the assumption that these provisions apply to sentencing for all covered offenses.

As previously mentioned, G.S. 20-179 sets forth minimum and maximum terms of imprisonment applicable to each level of punishment. A corresponding provision, G.S. 15A-1351(b), states that a sentence to imprisonment "[f]or persons convicted of impaired driving under G.S. 20-138.1 . . . must

[329]. 542 U.S. 296 (2004).

[330]. *See* State v. Santon, 101 N.C. App. 710, 712, 401 S.E.2d 117, 118 (1991) (holding that a conviction of driving while impaired under G.S. 20-138.1, regardless of the level of punishment imposed, constitutes a prior conviction of an offense punishable by more than 60 days' imprisonment for purposes of sentencing under the Fair Sentencing Act).

[331]. G.S. 15A-1371(a).

[332]. *See supra* note 256.

impose a maximum term and may impose a minimum term." G.S. 15A-1351(b) further provides that "[t]he impaired driving judgment may state the minimum term or may state that a term constitutes both the minimum and maximum terms." If a judgment imposed pursuant to G.S. 20-179 for a covered offense states no minimum term, a defendant becomes eligible for parole in accordance with G.S. 15A-1371(a).

G.S. 15A-1371(a) provides that if no minimum sentence is imposed for a prisoner serving an active term of imprisonment for a conviction of impaired driving, the person is eligible for release on parole at any time, subject to the limitations below. If the sentence includes a minimum term of imprisonment, the person is eligible for release on parole upon completion of the minimum term or one-fifth the maximum penalty allowed by law for the offense for which the prisoner is sentenced, whichever is less.[333] Good time credit allowed under G.S. 15A-1355 reduces the term that must expire before a defendant becomes eligible for release on parole.[334] Because good time credit is awarded day for day,[335] the time that must expire before a defendant is parole-eligible effectively is halved.

The release of an otherwise parole-eligible defendant is limited by G.S. 20-179(p)(3), which prevents a defendant from being released on parole until he has served the mandatory minimum term of imprisonment. In addition, to be released on parole, the defendant must have obtained a substance abuse assessment and have completed any recommended treatment or training program or must be paroled into a residential treatment program.[336] A defendant paroled from a sentence of imprisonment imposed pursuant to G.S. 20-179 who has completed substance abuse treatment or training and who is not being paroled to a residential treatment program must, as a condition of parole, receive community service parole pursuant to G.S. 15A-1371(h)[337] or be required to "[r]emain in one or more specified places for a specified period or periods each day and wear a device that permits the defendant's compliance with the condition to be monitored electronically."[338]

An example may help illustrate when a defendant sentenced under G.S. 20-179 is eligible for parole. Defendant Daniels is sentenced under G.S. 20-179 to a minimum term of 12 months and a maximum term of 24 months for a Level One DWI. Assuming a full award of good time credit, Defendant Daniels is eligible for release on parole after serving 2.4 months imprisonment, a term constituting one-fifth of 12 months (the maximum sentence reduced by good time credit, which is less than the minimum term reduced by good time credits, or 6 months) if she has obtained a substance abuse assessment and has completed any recommended treatment or training program or is paroled into a residential treatment program.

Suppose instead that Defendant Daniels' sentence was for a minimum term of 30 days and a maximum term of 24 months. Again assuming a full award of good time credit, G.S. 15A-1371 renders Daniels parole-eligible after serving 15 days imprisonment (the minimum term reduced by good time credit, which is less than one-fifth of the statutory maximum reduced by good time credit). G.S. 20-179(p)(3)

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[333]. G.S. 15A-1371(a).

[334]. *Id*. § 15A-1355(c).

[335]. *See supra* note 307.

[336]. G.S. 20-179(p)(3).

[337]. Community service parole pursuant to G.S. 15A-1371(h) is "early parole for the purpose of participation in community service under the supervision of the Section of Community Corrections of the Division of Adult Correction."

[338]. *Id*. §§ 15A-1374(a1), (b)(8a).

requires, however, that Daniels serve the mandatory minimum term of imprisonment for a Level One DWI—30 days—before being released on parole. In addition and as noted in the previous example, Daniels must obtain a substance abuse assessment and complete any recommended treatment or training program before being released or Daniels must be paroled into a residential treatment program.

Notwithstanding the parole-eligibility rules of G.S. 15A-1371(a), a defendant serving a sentence of imprisonment of not less than 30 days nor as great as 18 months for impaired driving[339] may be released on parole after serving one-third of the maximum sentence unless the Post-Release Supervision and Parole Commission finds in writing that:

> There is a substantial risk that he or she will not conform to reasonable conditions of parole; or
> His or her release at that time would unduly depreciate the seriousness of his or her crime or promote disrespect for law; or
> His or her continued correctional treatment, medical care, or vocational or other training in the institution will substantially enhance his or her capacity to lead a law-abiding life if he or she is released at a later date; or
> There is a substantial risk that he or she would engage in further criminal conduct.[340]

The term of parole under G.S. 15A-1371(g) is the unserved portion of the sentence of imprisonment. To provide the Post‑Release Supervision and Parole Commission an adequate opportunity to determine whether parole under G.S. 15A-1371(g) should be denied, a defendant eligible for parole under subsection (g) may not be released from confinement before the fifth full working day after he or she is placed in the custody of the Secretary of Public Safety or the custodian of a local confinement facility.

Again, an example may help illustrate the application of the parole provisions under G.S. 15A-1371(g) and their interplay with the parole eligibility rules in subsection (a) of this same statute, discussed earlier.
Suppose Defendant Diamond is sentenced to a minimum term of 30 days imprisonment and a maximum term of 12 months for a Level One DWI. Assuming a full award of good time credit and completion of a substance abuse assessment and any recommended treatment or training, Diamond is eligible for parole under G.S. 15A-1371(a) and G.S. 20-179(p) after serving 30 days imprisonment—the statutory mandatory minimum.[341] Had Diamond received this sentence for a Level Two DWI, he would have been parole-eligible after serving only 15 days of imprisonment, the minimum sentence reduced by good time credit, as that term exceeds the statutory mandatory minimum sentence of 7 days for a defendant sentenced for a Level Two DWI.[342]

Furthermore, Diamond may be paroled after completing one-third of his maximum sentence (which, in his case, is four months), absent a written determination from the Post-Release Supervision and Parole Commission that one of the four statutorily enumerated reasons for denying parole is present. The periods of imprisonment for purposes of determining parole eligibility under G.S. 15A-1371(g) are not

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[339]. For the same reasons that the provisions of G.S. Chapter 15A that refer to sentences for impaired driving under G.S. 20-138.1 encompass all offenses sentenced under G.S. 20-179, *see supra* note 256, this provision presumably applies to all covered offenses sentenced pursuant to G.S. 20-179.

[340]. G.S. 15A-1371(g).

[341]. *See id*. § 20-179(p)(3).

[342]. *Id*. § 15A-1371(a); 20-179(h).

reduced by the application of good time credit.

Statistics from the Department of Correction for the 2009–2010 fiscal year reflect that the 3,188 non–Structured Sentencing misdemeanants released from prison during that period, most of whom were convicted of impaired driving,[343] served an average of 6.5 months and 48 percent of the sentence imposed "due to good time, gain time and parole eligibility rules."[344] Given that good time alone would reduce a sentence of imprisonment for a covered offense by 50 percent, these statistics indicate that defendants infrequently are released on the earliest date at which they are parole-eligible. Moreover, because defendants sentenced for covered offenses must have either completed substance abuse treatment or training or been paroled into a residential treatment program, defendants who are paroled before their outright release date typically are paroled into DART Cherry's 90-day treatment program (for men) or the Black Mountain Substance Abuse Treatment Center for Women.[345]

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[343]. Other than covered offenses, the only misdemeanor offense that is excluded from Structured Sentencing Act provisions is the failure to comply with public health control measures under G.S. 130A-25. Far more defendants are convicted of covered offenses than public health control violations each year. In 2010–2011, for example, more than 40,000 defendants were convicted of covered offenses and fewer than 50 of violations of Chapter 130A.

[344]. NORTH CAROLINA DEPARTMENT OF CORRECTION, 2009–10 STATISTICAL REPORT 26 (hereinafter DOC 2009–10 STATISTICAL REPORT), http://randp.doc.state.nc.us/pubdocs/0007066.PDF.

[345]. In 2009–2010, parolees made up 38 percent of the participants in DART Cherry programs. DOC 2009–10 STATISTICAL REPORT, cited in full *supra* note 343, at 61. The Black Mountain Substance Abuse Treatment Center for Women opened in May 2010; statistics on its population were not available at the time of this publication.