

## RESTITUTION & EXPUNCTION



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### I. Restitution

1. The sentencing judge *shall* determine whether the defendant will be required to pay restitution. G.S. 15A-1340.34.
2. Restitution can be ordered “in addition to any penalty authorized by law”—*this includes an active sentence*. S.L. 15A-1340.34(c); G.S. 1998-212, sec. 19.4(d).
3. Restitution data:
  - a. In FY 2007/08, restitution was ordered in 12% of misdemeanor cases, with a median amount of \$230.
  - b. Restitution was ordered in 15.6% of all Community cases, 22.1% of all Intermediate cases, and 0.4% of all Active cases.
4. Mandatory restitution for Crime Victims’ Rights Act (CVRA) cases:
  - a. For offenses covered under the Crime Victims’ Rights Act (CVRA) (G.S. 15A-830), restitution is *required*.
  - b. The following misdemeanors are covered under the CVRA if the defendant and the victim have a “personal relationship” as defined in G.S. 50B-1(b) (Current or former spouses; persons of opposite sex who live together or have lived together; persons related as parents and children, or as grandparents and grandchildren; persons with a child in common; current or former household members; persons of the opposite sex who are in a dating relationship or have been in a dating relationship):
    - i. Assault with a deadly weapon;
    - ii. Assault inflicting serious injury;
    - iii. Assault on a female;
    - iv. Simple assault;
    - v. Assault by pointing a gun;
    - vi. Domestic criminal trespass;
    - vii. Stalking.
5. Amount of restitution:
  - a. The exact dollar amount of restitution must be set in open court. State v. Wilson, 340 N.C. 720 (1995).
  - b. The amount of restitution must be supported by evidence adduced at trial or at sentencing.
    - i. When a \$12,850 order of restitution to a homicide victim’s father was based only on information from the prosecutor, the court of appeals reversed the order and remanded the case to the trial court to rehear the restitution issue. State v. Replogle, 181 N.C. App. 579 (2007).
  - c. The court may delegate to a probation officer the authority to determine a payment schedule for restitution, and may authorize the probation officer to transfer the person to unsupervised probation after all moneys are paid. G.S. 15A-1343(g).

- d. To determine the amount of restitution, follow the formula in the statute (G.S. 15A-1340.35):
    - i. For offenses resulting in bodily injury to the victim:
      - 1. The cost of medical and related professional services, including physical, psychiatric, and psychological care;
        - a. It is not improper to include the cost of future treatment. State v. Canady, 153 N.C. App. 455 (2002).
      - 2. The cost of necessary physical and occupational therapy and rehabilitation;
      - 3. Lost income.
    - ii. For offenses resulting in damage, loss, or destruction of property:
      - 1. Require return of the property; or
      - 2. The value of the property on the date of damage, loss or destruction, or the value of the property on the date of sentencing, less the value of any part returned to the victim.
    - iii. For offenses resulting in the victim's death, the cost of funeral expenses.
  - e. Restitution may not be ordered for a victim's pain and suffering. State v. Wilson, 158 N.C. App. 235 (2003).
6. Defendant's ability to pay:
  - a. The court must take into consideration the resources of the defendant, including all real and personal property, ability to earn, and obligation to support dependants.
    - i. It was error to order the defendant (convicted of multiple counts of embezzlement) to pay \$208,900 in restitution (that's over \$3,000/month for 60 months); defendant had only \$800 in monthly income and paid about \$350 monthly in child support. State v. Hayes, 113 N.C. App. 172 (1993).
  - b. The court is not, however, required to make findings on these matters. G.S. 15A-1340.36.
    - i. The court of appeals upheld a \$40,588 order of restitution in a robbery and assault case, concluding that the proper standard of proof with respect to an award of restitution is the preponderance of the evidence, and the burden of demonstrating the financial resources of the defendant is on the defendant. Though the trial court did not make findings concerning the ability to pay, it was clear from the record that the court considered the defendant's financial situation—and consideration is all the statute requires. State v. Tate, 187 N.C. App. 593 (2007).
7. Partial restitution:
  - a. The court may order partial restitution to be paid by a certain date or in installments.
  - b. If it does order partial restitution, the court must state on the record its reasons for doing so. G.S. 15A-1340.36.
8. Restitution and work release—When an active sentence is imposed, the court must consider whether to recommend that restitution be made out of any earnings gained by the defendant if he or she is granted work release privileges. G.S. 148-33.2(b).
9. Restitution and civil judgments:
  - a. Restitution is not a legal obligation equivalent to a civil judgment. Shew v. Southern Fire & Casualty Co., 307 N.C. 438 (1983).
    - i. Imposition of restitution does not affect, and is not affected by, the victim's right to institute a civil action against the defendant based on the same conduct. Civil

- liability need not be established as a prerequisite to restitution. *Id.*; State v. Smith, 392 N.C. App. 184 (1990).
- ii. An order of restitution does not abridge the right of a victim to bring a civil action against the defendant for damages arising out of the defendant's offense. G.S. 15A-1340.37.
  - iii. If the victim does succeed in a civil action against the defendant, any amount paid by the defendant as restitution must be credited against any judgment rendered in a civil action arising out of the criminal offense. *Id.*
- b. A court hearing a criminal case generally may not order the defendant to pay money to the victim as a "civil judgment."
- i. It was error for the court to require a defendant convicted of obtaining property by false pretenses to sign a confession of judgment in favor of the victims. State v. Clemmons, 111 N.C. App. 569 (1993).
  - ii. "A confession of judgment is a procedure in a civil action," governed by procedures set out in the Rules of Civil Procedure (Rule 68.1). *Id.*
  - iii. "[N]o criminal court can compel any Defendant to do something which is within the realm of a civil forum, i.e., confess judgment." *Id.*
- c. Limited exception for CVRA cases:
- i. Restitution orders under G.S. 15A-1340.34(b)—which pertains *only* to crimes listed in the CVRA—exceeding \$250 may be "enforced in the same manner as a civil judgment." G.S. 15A-1340.38.
  - ii. Such judgments may be collected in the same manner as a civil judgment, unless the restitution is ordered as a condition of probation.
  - iii. In probation cases, the judgment may not be executed upon the defendant's property until the clerk is notified that the defendant's probation has been terminated or revoked *and* the judge has made a finding that restitution in a sum certain remains owed. G.S. 15A-1340.38.
- d. When a defendant is convicted of a criminal offense and ordered to pay restitution or restitution is imposed as a condition of probation, special probation, work release, or parole, then all applicable statutes of limitation and statutes of repose are tolled for purposes of any civil action brought by the victim against the defendant for damages arising out of the offense for which the defendant was convicted. G.S. 1-15.1(a).
- e. In any civil action brought against a defendant arising out of the offense for which the defendant was convicted, the defendant has the right to contest the amount of damages, the amount of restitution ordered is not admissible into evidence, and all restitution paid shall be credited against any civil judgment rendered against the defendant. G.S. 1-15.1(b).

## II. Expunction

	<b>G.S. 15A-145 Expunction of records of first offender convicted of misdemeanor</b>	<b>G.S. 90-96(e) Expunction of certain drug convictions</b>	<b>G.S. 14-50.30 Expunction of certain convictions under the gang laws</b>
<b>Offenses</b>	<ul style="list-style-type: none"> <li>- Misdemeanors other than traffic violations; underage alcohol possession</li> <li>- Based on statutory language, improper to expunge more than one conviction even if two or more convictions had been consolidated for judgment</li> </ul>	Misdemeanor possession of sched. II-VI controlled substance; drug paraphernalia; felony possession of less than 1 g. cocaine (note: this is not a specific offense)	Class H felonies under the Street Gang Suppression Act; enhanced misdemeanors for criminal gang activity
<b>Age</b>	Under 18 at time of conviction (or under 21 with respect to alcohol possession)	Under 22 at time of offense	Under 18 at time of conviction
<b>Prior record</b>	No prior convictions, other than traffic violations	<ul style="list-style-type: none"> <li>- No prior convictions,<sup>1</sup> other than traffic violations</li> <li>- No prior expunctions under G.S. 90-96</li> </ul>	No prior convictions, other than traffic violations
<b>Evidence of rehabilitation</b>	<ul style="list-style-type: none"> <li>- Two-year waiting period;</li> <li>- No intervening convictions;</li> <li>- No outstanding restitution;</li> <li>- Two affidavits of good character from unrelated persons</li> </ul>	<ul style="list-style-type: none"> <li>- 12-month waiting period;</li> <li>- No intervening convictions;</li> <li>- Completed drug education school (unless waived by the court)</li> </ul>	<ul style="list-style-type: none"> <li>- Two-year waiting period;</li> <li>- No intervening convictions;</li> <li>- No outstanding restitution;</li> <li>- Two affidavits of good character from unrelated persons</li> </ul>
<b>Process</b>	<ul style="list-style-type: none"> <li>- Petitioner files a petition in the court of conviction;</li> <li>- Petition served on DA; 10 days to object;</li> <li>- Petitioner pays \$125 fee;</li> <li>- If court able to make all necessary findings, it <i>shall</i> issue the order</li> </ul>	<ul style="list-style-type: none"> <li>- Petitioner files a petition (“application”) in the court;</li> <li>- Petitioner pays \$65 fee;</li> <li>- If court able to make all necessary findings, it <i>shall</i> issue the order</li> </ul>	<ul style="list-style-type: none"> <li>- Petitioner files a petition in the court of conviction;</li> <li>- Petition served on DA; 10 days to object;</li> <li>- If court able to make all necessary findings, unclear whether it <i>may</i> or <i>shall</i> issue the order</li> </ul>

Source: N.C. Sentencing and Policy Advisory Commission, Expunction Subcommittee

<sup>1</sup> Note: G.S. 90-96(e) initially defines the eligible class of petitioners as those not previously convicted of controlled substance offenses, but a later paragraph further limits expunction to those not convicted of any felony or misdemeanor (other than traffic) prior to the offense for which expunction is requested.

1. Effect of an expunction:
  - a. The successful petitioner is restored to the status he or she occupied before the conviction, and will not be held thereafter to be guilty of perjury or otherwise giving a false statement by reason of a failure to recite or acknowledge the conviction.
  - b. Investigative files in the DA's office need not be destroyed when a conviction is expunged. State v. Jacobs, 128 N.C. App. 559 (1998).
  - c. It may be a good policy to inform successful petitioners that DOC will not automatically remove records of prior incarceration or probation supervision from its files, but it will do so if asked. Petitioners may also want to check with third-party providers of criminal record data (e.g., 123nc.com) to see that their record has been cleared.
2. Expunction of arrest and prosecution resulting in no conviction or in subsequent exoneration:
  - a. Defendant found not guilty or charge dismissed. G.S. 15A-146(a).
    - i. When a felony or misdemeanor charge is dismissed or a not guilty verdict is entered, a person may apply to the court to expunge the arrest and court records concerning the charge, *if* the person has not previously received an expunction under G.S. 15A-146, G.S. 15A-145, or G.S. 90-96, *and* has not been convicted of a felony.
    - ii. The DA is not involved in an expunction of charges.
    - iii. The court *shall* order the expunction if all conditions are satisfied.
    - iv. It is improper for a judge to dismiss a *conviction* under G.S. 15A-146(a). In re Kearney, 174 N.C. App. 213 (2005).
  - b. Multiple *charges* (not convictions) may be dismissed under G.S. 15A-146(a1) if:
    - i. All of the charges were dismissed or findings of not guilty were made;
    - ii. The offenses were alleged to have occurred within the same 12-month period or the charges were dismissed or findings were made at the same term of court (week of superior court or day of district court) [note: the offenses need not arise out of the same transaction or occurrence and need not have been consolidated for judgment];
    - iii. The petitioner has not previously received an expunction under G.S. 15A-146(a1), G.S. 15A-145, or G.S. 90-96 [note how this prong apparently does not bar expunction under G.S. 15A-146(a1) for an applicant who has previously had a single charge expunged under G.S. 15A-146(a)—probably a drafting error]; *and*
    - iv. The petitioner has not been convicted of a felony.
  - c. Expunction when charges are dismissed or not guilty of Identity Theft. G.S. 15A-147.
  - d. Expunction of DNA records when charges are dismissed on appeal or pardon of innocence is granted. G.S. 15A-148.
  - e. Expunction for person who receives pardon of innocence from the governor. G.S. 15A-149.
3. Expunction provisions of G.S. 90-96:
  - a. G.S. 90-96(b) is the expunction provision for those who successfully complete probation without conviction under G.S. 90-96(a) [note: the statute does not appear to cover defendants who succeed under G.S. 90-96(a1)—probably a drafting error] and meet the following additional requirements:
    - i. Under 22 at the time of the offense;
    - ii. Never convicted of any felony or misdemeanor (other than traffic violations) before or since the offense to be expunged;
    - iii. Petitioner files the necessary affidavits.

- b. If a defendant is unsuccessful on G.S. 90-96 probation he or she may presumably still apply for expunction of the resultant conviction under G.S. 90-96(e).