

JAIL CREDIT AND SENTENCING

W. Anthony (Tony) Purcell
Assistant Public Defender
Mecklenburg County, NC

Sentencing Grid C/I/A

CLASS	PRIOR CONVICTION LEVELS		
	I	II	III
	0 Prior	1 to 4 Prior	5 or > Prior
A1	1-60 days C/I/A	1-75 days C/I/A	1-150 days C/I/A
1	1-45 days C	1-45 days C/I/A	1-120 days C/I/A
2	1-30 days C	1-45 days C/A	1-60 days C/I/A
3	1-15 days C	1-15 days C/A	1-30 days C/I/A

Pre-Justice Reinvestment Act

- Community Punishment
 - NOT active punishment
 - NOT intermediate punishment
 - NOR any of the conditions of probation listed in subdivision (6)
- Intermediate Punishment
 - Special probation/Split
 - Assignment to a residential program
 - House arrest
 - Intensive supervision
 - Day-reporting center
 - Drug treatment court program

Community Punishment under JRA

- NOT active punishment
- NOT assigned to drug treatment court
- NOR special probation/split

Community and Intermediate under JRA

- House arrest
- Community service
- Substance abuse assessment, monitoring, or treatment
- Participation in an educational or vocational skills development program, including an evidence-based program
- Submission to satellite-based monitoring, pursuant to Part 5 of Article 27A of Chapter 14 of the General Statutes, if the defendant is described by G.S. 14-208.40(a)(2)

Community and Intermediate under JRA

- Submission to a **period or periods** of confinement in a local confinement facility for a total of no more than **six days** per month during any **three separate months** during the period of probation. The six days per month confinement provided for in this subdivision may only be imposed as **two-day or three-day consecutive periods**.
- 15A-1343(a1)(3)

Community and Intermediate under JRA

- Submission to a **period or periods** of confinement in a local confinement facility for a total of no more than **six days** per month during any **three separate months** during the period of probation. The six days per month confinement provided for in this subdivision may only be imposed as **two-day or three-day consecutive periods**.
- 15A-1343(a1)(3)

How Does JRA Effect Specific Offenses/Levels?

- M/J 90-95(d)(4)
 - No active sentence allowed
 - 90-96 will become mandatory
- Class 3/Level 1 or Level 2
 - 1 – 10 days C or 1 – 15 days C/I
 - No active sentence allowed
 - **six days** per month during any **three separate months**
 - **18 days!**

JAIL CREDIT

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

Question 1

Your client was arrested on 1-1-11 and released 1-2-11. How many days of jail credit can you certify?

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

Credits Allowed §15-196.1

"the total amount of time a defendant has spent, committed to or in confinement in any State or local correctional, mental or other institution as a result of the charge that culminated in the sentence.

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

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

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

Answer 1

- d) Do not have enough information.

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

Question 2

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

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

State v. Richardson
295 NC 309 (1978)

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

The Time from May 4th to October 6th

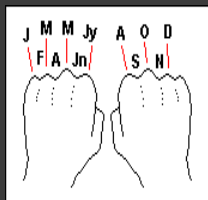
Have to count each day of each month
How can we remember how many days are in each month?

30 Days Hath September . . .
58 variations of the above!

My Favorite

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

Knuckle Trick



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

Real Mathematicians Use Their Fingers Count from May 4th to October 6th

<u>Knuckle Trick</u>	<u>How many days in the month?</u>
May	31 days
June	30 days
July	31 days
August	31 days
September	30 days
October	31 days

Real Mathematicians Use Their Fingers
Count from May 4th to October 6th

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

Total

=155

Summary of State v. Richardson

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

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

Answer 2

d) Do not have enough information.

Question 3

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

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

Answer 3

d) Do not have enough information.

Why?

Depends on the **type** of charge.

Question 4

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

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

DWI Sentencing §20-179

- (p) Limit on Amelioration of Punishment. -- For active terms of imprisonment imposed under this section:
- (1) The judge **may not give credit to the defendant for the first 24 hours of time spent in incarceration pending trial**
- (s)(1) Method of Serving Sentence (hour for hour for time actually served)
- (s)(3) weekend sentence immediately into effect if reports to jail with alcohol in system

Question 5

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

- a) Use any pre-trial credit available.
- b) Request weekend sentence.
- c) Recommend your client go into inpatient treatment.
- d) File MAR to set aside prior conviction.
- e) All the above.

DWI Sentencing §20-179 (o)

Proof of Prior Convictions

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

DWI Sentencing §20-179

(k1) Credit for Inpatient Treatment. -- Pursuant to G.S. 15A-1351(a),

The judge may credit against the active sentence imposed on a defendant the time the defendant was an inpatient at the treatment facility, provided such treatment occurred after the commission of the offense for which the defendant is being sentenced. . . .

Not allowable under NEW Aggravated Level 1 G.S. 20-179 (g)

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

Question 6

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

Habitual Impaired Driving §20-138.5

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

Habitual Impaired Driving §20-138.5

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

Question 7(a)

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

Question 7(b)

Your client is in jail for offense A only, for
10 days. He is re-arrested for offense
A and for offense B. After **10 days** of
incarceration, the following occurs:
b) Offense B is dismissed.
How many days credit for offense A?
20, since he was in custody "as a
result of the charge."

Question 7(c)

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

c) Offense A is dismissed, a new warrant is taken out for the same acts, but a new case number is assigned.

Is he still entitled to 20 days credit?

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

Question 7(d)

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

d) He is sentenced to 1 day, credit 1 day for offense B.

How many days credit are left for offense A?

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

Question 7(e)

Your client has **10 days** credit for offense A.

He is re-arrested for offense A and for the new offense of B.

If he receives a 30-day active sentence for **offense B**, and his court date for offense A is not for another 3 weeks.

What should you do?

Be VERY, VERY Quiet!!!

Allowance in cases of multiple sentences §15-196.2

... Consecutive sentences shall be considered as one sentence for the purpose of providing credit. **Each concurrent sentence shall be credited with so much of the time as was spent in custody due to the offense resulting in the sentence.**

Concurrent and Consecutive terms §15A-1354

(a) Authority of Court. -- When multiple sentences of imprisonment are imposed ... the sentences may run either concurrently or consecutively, as determined by the court. **If not specified or not required by statute to run consecutively, sentences shall run concurrently.**

Question 8(a)

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

How many more days does your client have to serve?

Sentences of Imprisonment §15A-1351(a)

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

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

Question 8(b)

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

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

SENTENCING

How to Avoid that
"Oh Shit" Moment

Question 1

Your client has the following prior record.

- 9-14-11 Speeding 51/35 Cost
- 2-15-05 DWLR PJC
- 3-6-06 Felony Larceny Prob
- 6-21-07 PV (fel. Lar) Revoked
- 3-9-06 R/O (sup ct) Prob
- 1-29-01 City Code Viol. Fine
- ??? Contempt of Court 30 days
- 4-13-06 Infraction Fine
- 10-30-09 Permitting Bitch at Large ?

How many points?
What is the record level?

Prior Conviction

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

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

Appeal Time Frame

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

PJC's & Prior Convictions

§15A-1340.11 (7)

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

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


PJC's & Prior Convictions

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

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

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

Defendant next contends the court erred in computing his prior record level points by assessing points for an offense to which he pled no contest and for which prayer for judgment was continued.

"A person has a prior conviction when, on the date a criminal judgment is entered, the person being sentenced has been previously convicted of a crime" N.C. Gen. Stat. §15A-1340.11 (7) (1997) (past offense). 

"For the purpose of imposing sentence, a person has been convicted when he has been adjudged guilty or has entered a plea of guilty or no contest." N.C. Gen. Stat. §15A-1331(b) (1997) (current offense). We have interpreted N.C. Gen. Stat. §15A-1331(b) to mean that formal entry of judgment is not required in order to have a conviction. Consequently, we conclude that defendant was convicted of the prior offense when he entered the plea of no contest even though no final judgment had been entered. This assignment of error is overruled.

PJC's & Prior Convictions

Despite §15A-1340.11(7)(a)

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

PJC counts as prior conviction.

Multiple Prior Convictions

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

City Code Violations

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

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

Contempt of Court

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

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

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

Infractions

§14-3.1 Infraction defined; sanctions

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

Permitting Bitch at Large

§67-2. Permitting bitch at large. If any person owning or having any bitch shall knowingly permit her to run at large during the erotic stage of copulation he shall be guilty of a Class 3 misdemeanor.

(1862-3, c. 41, s. 2; Code, s. 2501; Rev., s. 3303; C.S., s. 1670; 1993, c. 539, s. 529;

1994, Ex. Sess., c. 24, s. 14(c).)

Level II, with 3 or 4 points

9-14-11	Speeding 51/35	Cost	<input checked="" type="radio"/> X
2-15-05	DWLR	PJC	<input checked="" type="radio"/> 1
3-6-06	Felony Larceny	Prob	<input checked="" type="radio"/> 1
6-21-07	PV (fel. Lar)	Revoked	<input checked="" type="radio"/> X
3-9-06	R/O (sup ct)	Prob	<input checked="" type="radio"/> X
1-29-01	City Code Viol.	Fine	<input checked="" type="radio"/> ?
???	Contempt of Court	30 days	<input checked="" type="radio"/> X
4-13-06	Infraction	Fine	<input checked="" type="radio"/> X
10-30-09	Permitting Bitch at Large	?	<input checked="" type="radio"/> 1

Total of 3 or 4

Question 2

Your client is charged with Second-Degree Trespassing and is a Level I.

Class 1, level I = Community Punishment

He has been in jail for 8 days.

Does the Judge have to give him a suspended sentence?

Active Punishment for Time Served

§15A-1340.20(c1) Active Punishment Exception. –

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

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

Question 3

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

What is the maximum sentence your client could receive?

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

Multiple Convictions

§15A-1340.22(a) Limits on Consecutive Sentences.

If the court elects to impose consecutive sentences for two or more misdemeanors and the most serious misdemeanor is classified in Class A1, Class 1, or Class 2, the **cumulative length of the sentences of imprisonment shall not exceed twice the maximum** sentence authorized for the class and prior conviction level of the most serious offense.

Consecutive sentences shall not be imposed if all convictions are for Class 3 misdemeanors.

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

Question 4

Your client is convicted of **8 counts** of larceny as a level II and the Judge sentences him to two active sentences of **45 days**, followed by **6** suspended sentences with a split of **10 days each**, all to run **consecutive** to each other.

What's the sentence?

45 days?

90 days?

150 days?

State v. Remley

2009 N.C. App. LEXIS 1851; 686 S.E.2d 160

§15A-1351(a) states that each split **shall not exceed one fourth the maximum penalty allowed by law.**

BUT must also comply with §15A-1340.22(a) the **cumulative length of the sentences of imprisonment shall not exceed twice the maximum** sentence authorized for the class and prior conviction level of the most serious offense.

Question 5

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

What is the sentence?

Concurrent and Consecutive Terms

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

ANSWER: Concurrent.

Question 6

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

Do you need to appeal to prevent a point?

Prior Record Level for Felony Sentencing

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

ANSWER: No.

Question 7

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

What effect will this have on his probation?

Response to Violations

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

ANSWER: No effect on probation.

Restitution Issues

Do they EVER do it right in District Court?

Restitution 15A-1340.34 – 1340.38

15A-1340.34(a) When sentencing a defendant convicted of a criminal offense, the court **shall determine** whether the defendant shall be ordered to make restitution to any victim of the offense in question.

Basis of Restitution

15A-1340.35(a) the court **shall** consider the following:
The cost of **necessary medical and related professional services** and devices or equipment relating to physical, psychiatric, and psychological care required by the victim;
The cost of necessary physical and occupational **therapy and rehabilitation** required by the victim; and
Income lost by the victim as a result of the offense.
Return of the property to the owner of the property or someone designated by the owner; or
The **value of the property** on the date of the damage, loss, or destruction; or
The value of the property on the date of sentencing, **less the value of any part of the property that is returned.**
Any measure of restitution specifically provided by law for the offense committed by the defendant.
(b) The **court may require** that the victim or the victim's estate **provide admissible evidence that documents the costs claimed by the victim or the victim's estate** under this section. Any such documentation shall be shared with the defendant before the sentencing hearing.

Determination of Restitution

15A-1340.36

the court **shall take into consideration the resources of the defendant** including all real and personal property owned by the defendant and the income derived from the property, **the defendant's ability to earn, the defendant's obligation to support dependents,** and any other matters that pertain to the defendant's ability to make restitution, but the court is not required to make findings of fact or conclusions of law on these matters. The amount of **restitution must be limited to that supported by the record,** and the court *may order partial restitution* when it appears that the damage or loss caused by the offense is **greater than that which the defendant is able to pay.** If the court orders partial restitution, the court shall state on the record the reasons for such an order.

State v. Davis

2010 N.C. App. LEXIS 1556

The State concedes that there is no evidence in the record that the State introduced testimony or sworn affidavits to support its request for restitution. This Court has held that “[t]he **unsworn statement** of the prosecutor is **insufficient** to support the amount of restitution ordered.”

Shelton, 167 N.C. App. at 233, 605 S.E.2d at 233 (citing *State v. Buchanan*, 108 N.C. App. 338, 423 S.E.2d 819 (1992)).

State v. Davis

2010 N.C. App. LEXIS 1556

The State contends that defendant **stipulated** to the amount of restitution when defendant stipulated to the **factual basis** for the plea. Additionally, the State alleges that the specific amounts of restitution owed to the victims were **incorporated** into the stipulated factual basis by reference to the restitution worksheets submitted to the court.

State v. Davis 2010 N.C. App. LEXIS 1556

"[A] restitution worksheet, unsupported by testimony or documentation is insufficient to support an order of restitution." Mauer, ___ N.C. App. at ___, 688 S.E.2d at 778.

In the instant case, defendant **did not stipulate** to the amounts awarded, and there was **no evidence presented** to support the restitution worksheets. Therefore, the trial court erred in awarding \$2,539.06 in restitution.

The END!!!

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

Cheat Sheet Summary

- Offense Classes and Prior Conviction Chart
- Potential higher levels noted
- Possible felony enhancements noted with **F**
- Some collateral consequences
- (DNA/Sex Offender Registry)
- Sentencing rules and statutes
- DWI Sentencing Issues
- New DWI laws
 - Aggravated Level 1
 - Child age is now under 18 and includes mental/physical infirmity
 - If that aggravating factor is present = Level 1
- References to statutes, websites and AOC forms

SENTENCING AND JAIL CREDIT

SENTENCING (NON-DWI)

Cheat Sheet (common classes of offenses/sentencing rules/collateral consequences)

- NEW for 2011, Justice Reinvestment Act. Applies to offenses occurring on or after December 1, 2011.
- Uses legislative type for new provisions and ~~deleted provisions~~.
- Grid under §15A-1340.23.
- Structured Sentencing (best to worst) Level 1, Level 2, Level 3.
- Fair Sentencing Act (DWI) Level 5, Level 4, Level 3, Level 2, Level 1, and Aggravated Level 1.
- For DWI, you would rather be high, for everything else low is the way to go!
- Simple as 1, 2, 3.
- 1 = Class of Offense; 2 = Prior Conviction Level; 3 = Sentencing Disposition.

I. Class of Offense (see cheat sheet)

- District Attorney's discretion as to what a defendant pleads to and what is dismissed or reduced. For Superior Court statutes, see §15A-1023(b) & 1024.
 - DA may remain silent, not oppose, recommend or agree to a particular sentence.
 - Judge's discretion as to sentence, as long as within sentencing grid and agreement. See §15A-1023(b) & 1024 as to Superior Court agreements and remedy.
- Motor Vehicle Offenses -Unless a specific penalty is otherwise provided by law, a person convicted of a misdemeanor contained in this Article is guilty of a Class 2 misdemeanor. §20-176(b)
- ABC Laws -Unless a different punishment is otherwise expressly stated, any person who violates any provision of this Chapter shall be guilty of a Class 1 misdemeanor. §18B-102
- General Misdemeanors -Any misdemeanor for which no specific classification and no specific punishment are prescribed by statute shall be punishable as a Class 1 misdemeanor. §14-3(a)
 - Any misdemeanor that has a specific punishment, but is not assigned a classification by the General Assembly pursuant to law is classified as follows, based on the maximum punishment allowed by law for the offense as it existed on the effective date of Article 81B of Chapter 15A of the General Statutes:
 - (1) If that maximum punishment is more than six months imprisonment, it is a Class 1 misdemeanor;
 - (2) If that maximum punishment is more than 30 days but not more than six months imprisonment, it is a Class 2 misdemeanor; and
 - (3) If that maximum punishment is 30 days or less imprisonment or only a fine, it is a Class 3 misdemeanor.
- Infractions -An infraction is a noncriminal violation of law not punishable by imprisonment. Unless otherwise provided by law, the sanction for a person found responsible for an infraction is a penalty of not more than one hundred dollars. §14-3.1(a)

- Local Ordinance - . . . if any person shall violate an ordinance of a county, city, town . . . he shall be guilty of a Class 3 misdemeanor and shall be fined not more than \$500.00. No fine shall exceed \$50.00 unless the ordinance expressly states that the maximum fine is greater than \$50.00. §14-4(a)
- Local Ordinance Regulating to Vehicles -If any person shall violate an ordinance of a county, city, or town regulating the operation or parking of vehicles, he shall be responsible for an infraction and shall be required to pay a penalty of not more than \$50.00. §14-4(b)
- ITPP -Depends on the value. If greater than \$200 = Class 1. If less than \$200 = Class 2. §14-160
- Possession of M/J -Depends on the amount. If greater than ½ ounce = Class 1. If less than ½ ounce = Class 3. Class 3 M/J MUST be given a suspended sentence. §90-95(d)(4) What about the new provisions in the Justice Reinvestment Act concerning periods of confinement? §15A-1343(a1)(3)
- Open Container under Chapter 20 -If driver and 1st offense = Class 3. If driver and has prior conviction = Class 2. If passenger = infraction and is NOT a moving violation. §20-138.7(e)
- Unlawful Concealment -Can be a Class 1, 2 or 3, depending on prior convictions. Class 2 and 3 require community service if sentence is suspended, unless judge makes specific finding that defendant is unable to perform OR grants a PJC. Class 1 requires minimum split sentence of 11 days. §14-72.1(e)
- Worthless Check -
 - Greater Than \$2000 = Felony. §14-107(d)
 - Nonexistent Account = Class 1. §14-107(d)(3)
 - Closed Account = Class 1. §14-107(d)(4)
 - Three or More Convictions = Class 1 and banned from checking. §14-107(d)(1)
 - Otherwise = Class 2. §14-107(d)(1)
- Secret Peeping -
 - If by using a photographic device = Class A1. §14-202(c)
 - Felony if photo for arousal, without consent, installs photo device or possession. §14-202(d)(e)(f) & (g)
 - Otherwise = Class 1. §14-202(a)
 - Second Offense
 - Of Class 1 = Class A1, of Class A1 = Felony. §14-202(i)
 - Judge must consider danger and can order sex offender registration. §14-202(l)
 - Judge must impose psychological evaluation and treatment. §14-202(i)(2)

Always Look For Potential Enhancements and Possible Felony Charges

Enhancements

- If a misdemeanor offense as to which no specific punishment is prescribed be infamous, done in secrecy and malice, or with deceit and intent to defraud, the offender shall, except where the offense is a conspiracy to commit a misdemeanor, be guilty of a Class H felony. §14-3(b)
- If any Class 2 or Class 3 misdemeanor is committed because of the victim's race, color, religion, nationality, or country of origin, the offender shall be guilty of a Class 1 misdemeanor. If any Class A1 or Class 1 misdemeanor offense is committed because of

the victim's race, color, religion, nationality, or country of origin, the offender shall be guilty of a Class H felony. §14-3(c)

- If enhancements are not alleged, they cannot be used. Must be plead and proven. *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004))

Conspiracy and Attempt §14-2.5 (=1 Class lower)

- Unless a different classification is expressly stated, an attempt to commit a misdemeanor or a felony is punishable under the next lower classification as the offense which the offender attempted to commit. An attempt to commit a Class A or Class B1 felony is a Class B2 felony, an attempt to commit a Class B2 felony is a Class C felony, an attempt to commit a Class I felony is a Class 1 misdemeanor, and an attempt to commit a Class 3 misdemeanor is a Class 3 misdemeanor.

Solicitation §14-2.6

- (a) Unless a different classification is expressly stated, a person who solicits another person to commit a felony is guilty of a felony that is two classes lower than the felony the person solicited the other person to commit, except that a solicitation to commit a Class A or Class B1 felony is a Class C felony, a solicitation to commit a Class B2 felony is a Class D felony, a solicitation to commit a Class H felony is a Class 1 misdemeanor, and a solicitation to commit a Class I felony is a Class 2 misdemeanor.
- (b) Unless a different classification is expressly stated, (CAN/prostitution) a person who solicits another person to commit a misdemeanor is guilty of a Class 3 misdemeanor.

Aid and Abet & Acting in Concert (common law concepts)

- Guilty of same Class as Principal.
- Except Aid and Abet DWI is always a level 5. §20-179(f1)

II. Prior Conviction Level §15A-1340.11(7)

- Definitions
 - Prior conviction. -- A person has a prior conviction when, on the date a criminal judgment is entered, the person being sentenced has been previously convicted of a crime:
 - In the district court, and the person has not given notice of appeal and the time for appeal has expired; or
 - In the superior court, regardless of whether the conviction is on appeal to the appellate division.
- Contempt is not a criminal conviction. *State v. Reaves*, 142 N.C. App. 629 (2001).
- Infractions are not criminal convictions. §14-3.1(a), §15A-1340.11(7)

Prior Convictions from Same Session §15A-1340.21(d)

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

Prior Conviction Standard of Proof §15A-1340.21(c)

- Proof of Prior Convictions. -- A prior conviction shall be proved by any of the following methods:
 - (1) Stipulation of the parties.

- (2) An original or copy of the court record of the prior conviction.
- (3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts.
- (4) Any other method found by the court to be reliable.
- The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction. The original or a copy of the court records or a copy of the records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts, bearing the same name as that by which the offender is charged, is prima facie evidence that the offender named is the same person as the offender before the court, and that the facts set out in the record are true. For purposes of this subsection, "copy" includes a paper writing containing a reproduction of a record maintained electronically on a computer or other data processing equipment, and a document produced by a facsimile machine. Evidence presented by either party at trial may be utilized to prove prior convictions. Suppression of prior convictions is pursuant to G.S. 15A-980. (Also see §20-179(o) for DWI cases) If a motion is made pursuant to that section during the sentencing stage of the criminal action, the court may grant a continuance of the sentencing hearing.
- Out of State Conviction §15A-1340.11(7)(c)
 - A person has a prior conviction when, on the date a criminal judgment is entered, the person being sentenced has been previously convicted of a crime: . . . In the courts of the United States, another state, the armed services of the United States, or another country, regardless of whether the offense would be a crime if it occurred in North Carolina, . . . regardless of whether the crime was committed before or after the effective date of this Article.

III. Sentencing Dispositions Definitions (C/I/A) §15A-1340.11

- Community punishment §15A-1340.11(2)
 - A sentence in a criminal case that does not include an active punishment, an intermediate punishment, or any of the conditions of probation listed in subdivision (6) of this section.
 - Time Served Active Punishment Exception §15A-1340.20
 - The court may impose an active punishment for a class of offense and prior conviction level that does not otherwise authorize the imposition of an active punishment if the term of imprisonment is equal to or less than the total amount of time the offender has already spent committed to or in confinement in any State or local correctional, mental, or other institution as a result of the charge that culminated in the sentence.
- NEW Community punishment based on Justice Reinvestment Act §15A-1340.11(2)
 - A sentence in a criminal case that does not include an active punishment or assignment to a drug treatment court, or special probation as defined in G.S. 15A-1351(a). ~~punishment, an intermediate punishment, or any of the conditions of probation listed in subdivision (6) of this section.~~ It may include any one or more of the conditions set forth in G.S. 15A-1343(a1).
 - Community and Intermediate Probation Conditions §15A-1343(a1)
 - In addition to any conditions a court may be authorized to impose pursuant to G.S. 15A-1343(b1), the court may include any one or more of the following conditions as part of a community or intermediate punishment:
 - (1) House arrest with electronic monitoring.

- (2) Perform community service.
 - (3) Submission to a period or periods of confinement in a local confinement facility for a total of no more than six days per month during any three separate months during the period of probation. The six days per month confinement provided for in this subdivision may only be imposed as two-day or three-day consecutive periods.
 - (4) Substance abuse assessment, monitoring, or treatment.
 - (5) Participation in an educational or vocational skills development program, including an evidence-based program.
 - (6) Submission to satellite-based monitoring, pursuant to Part 5 of Article 27A of Chapter 14 of the General Statutes, if the defendant is described by G.S. 14-208.40(a)(2).
- Intermediate Punishment §15A-1340.11(6)
 - A sentence in a criminal case that places an offender on supervised probation and includes at least one of the following conditions:
 - Special probation as defined in G.S. 15A-1351(a). (Split Sentence)
 - [m]ay not exceed one-fourth the maximum sentence of imprisonment imposed for the offense, and no confinement other than an activated suspended sentence may be required beyond two years of conviction.
 - In imposing a sentence of special probation, the judge may credit any time spent committed or confined, as a result of the charge, to either the suspended sentence or to the imprisonment required for special probation.
 - Assignment to a residential program.
 - House arrest with electronic monitoring.
 - Intensive probation.
 - Assignment to a day-reporting center.
 - Assignment to a drug treatment court program.
- NEW Intermediate Punishment based on Justice Reinvestment Act §15A-1340.11(6)
 - A sentence in a criminal case that places an offender on supervised probation. ~~probation and includes at least one~~ It may include drug treatment court, special probation as defined in G.S. 15A-1351(a), and one or more of the following conditions: conditions set forth in G.S. 15A-1343(a1).
 - ~~• a. Special probation as defined in G.S. 15A-1351(a).~~
 - ~~• b. Assignment to a residential program.~~
 - ~~• c. House arrest with electronic monitoring.~~
 - ~~• d. Intensive supervision.~~
 - ~~• e. Assignment to a day-reporting center.~~
 - ~~• f. Assignment to a drug treatment court program.~~
 - Community and Intermediate Probation Conditions §15A-1343(a1)
 - In addition to any conditions a court may be authorized to impose pursuant to G.S. 15A-1343(b1), the court may include any one or more of the following conditions as part of a community or intermediate punishment:
 - (1) House arrest with electronic monitoring.
 - (2) Perform community service.
 - (3) Submission to a period or periods of confinement in a local confinement facility for a total of no more than six days per month

during any three separate months during the period of probation. The six days per month confinement provided for in this subdivision may only be imposed as two-day or three-day consecutive periods.

- (4) Substance abuse assessment, monitoring, or treatment.
- (5) Participation in an educational or vocational skills development program, including an evidence-based program.
- (6) Submission to satellite-based monitoring, pursuant to Part 5 of Article 27A of Chapter 14 of the General Statutes, if the defendant is described by G.S. 14-208.40(a)(2).
- Time Served Active Punishment Exception §15A-1340.20
 - The court may impose an active punishment for a class of offense and prior conviction level that does not otherwise authorize the imposition of an active punishment if the term of imprisonment is equal to or less than the total amount of time the offender has already spent committed to or in confinement in any State or local correctional, mental, or other institution as a result of the charge that culminated in the sentence.
- Active punishment §15A-1340.11(1)
 - A sentence in a criminal case that requires an offender to serve a sentence of imprisonment and is not suspended. Special probation, as defined in G.S. 15A-1351, is not an active punishment.

Multiple Sentences §15A-1340.15 (felony) & §15A-1340.22 (misdemeanor)

- Consolidate §15A-1340.22(b)
 - If an offender is convicted of more than one offense at the same session of court, the court may consolidate the offenses for judgment and impose a single judgment for the consolidated offenses. Any sentence imposed shall be consistent with the appropriate prior conviction level of the most serious offense.
- Concurrent §15A-1354(a)
 - If not specified or not required by statute to run consecutively, sentences shall run concurrently.
- Consecutive § 15A-1340.22
 - (a) Limits on Consecutive Sentences. -- If the court elects to impose consecutive sentences for two or more misdemeanors and the most serious misdemeanor is classified in Class A1, Class 1, or Class 2, the cumulative length of the sentences of imprisonment shall not exceed twice the maximum sentence authorized for the class and prior conviction level of the most serious offense.
 - Consecutive sentences shall not be imposed if all convictions are for Class 3 misdemeanors.
 - Look out for Habitual DWI. Mandatory consecutive sentence, “[s]entences imposed under this subsection shall run consecutively with and shall commence at the expiration of any sentence being served.” §20-138.5

Presentence Report §15A-1332

- The court may order probation to conduct presentence investigation and submit written or oral report. Sentence recommendations may be included if requested. §15A-1332(b)
- May require more detailed study by DOC for short period, not to exceed 90 days, for a felony, Class A1 or Class 1 if defendant consents.

Probation Lengths §15A-1343.2(d)

- Unless the court makes specific findings that longer or shorter periods of probation are necessary, the length of the original period of probation for offenders sentenced under Article 81B shall be as follows:
 - (1) For misdemeanants sentenced to community punishment, not less than six nor more than 18 months;
 - (2) For misdemeanants sentenced to intermediate punishment, not less than 12 nor more than 24 months.

Period of Probation §15A-1342(a)

5 year maximum (DWI)

2 year maximum for Deferred Prosecution

Class 3 Misdemeanors §15A-1344(d)

- . . . provided that probation may not be revoked solely for conviction of a Class 3 misdemeanor.
- Class 3 misdemeanors, City Code violations and Infractions WILL not revoke probation.

Fines §15A-1340.23(b)

- (b) Unless otherwise provided for a specific offense, the maximum fine is:
 - Class A1 and Class 1 is in the discretion of the court.
 - \$1,000 for a Class 2 misdemeanor
 - \$200.00 for a Class 3 misdemeanor

Restitution §15A-1340.34 through §15A-1340.38

- Basis
- Determination
- Defendant's Ability to Pay
- Partial Restitution
- Enforcement

IV. Special Rules for Particular Issues

Possession of M/J & PDP

- If greater than ½ ounce = Class 1. If ½ ounce or less = Class 3. Class 3 M/J MUST be given a suspended sentence. §90-95(d)(4) What about the new provisions in the Justice Reinvestment Act concerning periods of confinement? §15A-1343(a1)(3)
- §90-96 Judgment (see amended statute for changes as a result of the Justice Reinvestment Act)
 - Whenever any person who has **not previously been convicted** of any offense under this Article or under any statute of the United States or any state relating to those substances included in Article 5 or 5A of Chapter 90 or to that paraphernalia included in Article 5B of Chapter 90 pleads guilty to or is found guilty of (i) a misdemeanor under this Article by possessing a controlled substance included within Schedules II through VI of this Article or by possessing drug paraphernalia as prohibited by G.S. 90-113.21, or (ii) a felony under G.S. 90-95(a)(3) by possessing less than one gram of cocaine, the court ~~may~~, shall, **without entering a judgment of guilt** and with the consent of such person, **defer further proceedings** and place him on probation upon such reasonable terms and conditions as it may require. §90-96(a)

- Court may allow the defendant to participate in a drug education program approved for this purpose by the Department of Health and Human Services. Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided. Upon fulfillment of the terms and conditions, the court **shall discharge** such person and **dismiss** the proceedings against him. Discharge and dismissal under this section shall be without court adjudication of guilt and **shall not be deemed a conviction** for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime including the additional penalties imposed for second or subsequent convictions under this Article.
- For the purposes of determining whether the conviction is a first conviction or whether a person has already had discharge and dismissal, **no prior offense occurring more than seven years before the date of the current offense** shall be considered.

Domestic Violence §15A-1382.1

- When convicted of an offense involving assault, or communicating a threat, the presiding judge shall determine whether the defendant and victim had a personal relationship. If so,
 - The judge shall determine whether the defendant shall comply with one or more of the special conditions of probation set forth in §15A-1343(b1). Court may also require house arrest under §15A-1343(3c).

Victim's Rights Act <http://www.nccourts.org/Citizens/CPrograms/Victims/Offenses.asp>

- are current or former spouses,
- are persons of the opposite sex who live together or have lived together,
- are related as parents and children, including others acting in loco parentis to a minor child, or as grandparents and grandchildren,
- have a child in common,
- are current or former household members, or
- are persons of the opposite sex who are in a dating relationship or have been in a dating relationship.
- **Covered Offenses**

STATUTE	OFFENSE	CLASS
14-33(a)	Simple assault, simple assault and battery, or simple affray	2
14-33(c)(1))	Assault, assault and battery, or affray that inflicts serious injury or that involves the use of a deadly weapon	A1
14-33(c)(2)	Assault, assault and battery, or affray that involves an assault on a female	A1
14-34	Assaulting by pointing gun	A1
14-134.3	Domestic criminal trespass	1
14-277.3	Stalking	A1

Habitual Misdemeanor Assault §14-33.2

- A person violates any of the provisions of G.S. 14-33 and causes physical injury
- or G.S. 14-34 (assault by pointing gun)
- and two or more prior convictions for either misdemeanor or felony assault, with the earlier of the two prior convictions occurring no more than 15 years prior to the date of the current violation.

Firearm Notification §15A-1336

- AOC must develop a form to comply with the criminal case firearm notification requirements of the Violence Against Women Act of 2005. (See AOC-CR-617)

Potential Sex Offender Registration §14-208.7

- Secret Peeping under §14-202(d), (e), (f), (g) or (h) (all felonies) or a second or subsequent conviction of (a), (a1) or (c) only if ordered by court under (1).
- Sexual Battery under §14-27.5A.

DNA Sample §15A-266.4

- Assault on handicapped person under §14-32.1.
- Stalking under §14-277.3.
- Sexual Battery under §14-27.5A.
- Cyberstalking §14-196.3. (New, effective Feb. 1, 2011)

DNA Sample Upon Arrest §15A-266.3A (New, effective Feb. 1, 2011)

V. Other Considerations**Look for Mandatory Consecutive Sentences**

- Habitual DWI, Habitual Felon, Habitual Violent Felon and Chapter 90 Trafficking.
- Habitual DWI statute says, “[s]entences imposed under this subsection shall run consecutively with and shall commence at the expiration of any sentence being served.” §20-138.5

Prior Record Level for Felony Sentencing §15A-1340.14(5)

- For each prior misdemeanor conviction as defined in this subsection, 1 point. For purposes of this subsection, misdemeanor is defined as any Class A1 and Class 1 nontraffic misdemeanor offense, impaired driving (G.S. 20-138.1), impaired driving in a commercial vehicle (G.S. 20-138.2), and misdemeanor death by vehicle (G.S. 20-141.4(a2)), but not any other misdemeanor traffic offense under Chapter 20 of the General Statutes.

Appeal §15A-1431

- Reasons for appeal include acquittal, but other considerations include:
 - Better sentence through negotiation.
 - Pending Felony (save points, credit, cross examination).
 - Probation Revocation concerns. See attached “Effects of Convictions” cheat sheet.
- If you appeal, the State may reinstate cases that were dismissed as part of a plea. §15A-1431(b)

- Notice of Appeal may be entered within 10 days of entry of judgment, either in open court or in writing. May withdraw appeal within same 10 day window. §15A-1431(c)
- The 10 days begin the day after judgment is entered. Count each calendar day, weekend and weekday. If the 10th day falls on a weekend or holiday, go to the next business day.
- After that 10 day window, if appeal has been entered and not withdrawn, the clerk is to transfer the case to superior court. §15A-1431(c)
- Judge must review the case and fix conditions of pretrial release. §15A-1431(d)
- Any prior order of pretrial release remains in effect unless modified. §15A-1431(e)
- Appeal stays payment of costs, fines, probation, special probation (split sentence) and active punishment. §15A-1431(f1)
 - BUT judge can modify bond. §15A-1431(d), (e), (f1), & §15A-534(e)(1)
- Remand (or withdraw of appeal) at any time PRIOR to calendaring for trial is automatic without the consent of the DA or of the court. This section is silent as to the attachment of the superior court costs, but probably safer to request that they be remitted. §15A-1431(g)
- Remand (or withdraw of appeal) AFTER calendaring for trial only with consent of the court and with the attachment of the superior court costs, unless remitted. §15A-1431(h)
- DWI remand (or withdraw of appeal) is completely the opposite. Resentencing upon remand or withdrawal of appeal is required. §20-38.7(c) & §15A-1431(g) & (h)
- Upon remand, you may need to change when probation starts, when a split or weekends begin or time frame for completion of things like community service. See [AOC-CR-320](#) (Judgment Modifying Time Periods Of Probation After Termination Of Appeal).
- What about new convictions after appeal but before remand? Except for DWI, sentence is exactly the same. If silent, concurrent. §15A-1354(a)

DWI SENTENCING

Cheat Sheet (for DWI, you would rather be high, for everything else low is the way to go!)

Aggravating and Grossly Aggravating Factors §20-179(c) & (d)

- Must allege factors and must prove beyond a reasonable doubt at trial or sentencing hearing. §20-179(a)(1)
- Superior court procedure requires notice and admission or bifurcation of trial. §20-179(a1) & (a2)
- Use [AOC form CR-311](#) to show that only 1 Grossly Aggravating Factor regardless of the number of children in car or persons injured.

Grossly Aggravating Factors §20-179(c)

- A conviction for an offense involving impaired driving within seven years of the date of this offense (See §20-179(o) re: rebutting priors)
- Each prior conviction is a separate grossly aggravating factor
- District court conviction that is appealed and either withdrawn or remanded BUT not yet resentenced
- The defendant's driver's license was revoked for an impaired driving offense at the time of this offense
- Serious injury to another person caused by the defendant's impaired driving at the time of this offense
- A child under the age of 16 years was in the vehicle at the time of this offense
 - **NEW LAW effective 12-1-11**= Driving by the defendant while (i) a child under the age of 16 ~~years~~ 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

Weighing Grossly Aggravating Factors §20-179(c)

- If any Grossly Aggravating Factors exist, it's as simple as counting them up.
 - Only 1 (so long as it is not the new factor involving age/disability) = Level 2
 - Two or more **OR** new factor involving age/disability = Level 1.
 - **NEW** Three or more = Aggravated Level 1.
- May still consider Mitigating and Aggravating Factors in determining the appropriate sentence.
- If no Grossly Aggravating Factors, judge must weigh Aggravating and Mitigating Factors. §20-179(f)
- Prior convictions may be challenged if defendant shows by the preponderance of the evidence that the conviction was obtained while defendant was indigent, had no counsel and had not waived counsel. §20-179(o) (also see §15A-980)

Sentencing for Levels 1 & 2 §20-179(g) & (h)

- **MAY** be suspended with these Probation Conditions:
- | <u>Level</u> | <u>Max</u> | <u>Mandatory Minimum Sentence</u> |
|--------------|-------------------------------------|-----------------------------------|
| <u>Agg 1</u> | <u>36 months</u>
<u>\$10,000</u> | <u>120 days</u> |
| 1 | 24 months
\$4,000 fine | 30 days |
| 2 | 12 months
\$2,000 fine | 7 days |
- If suspended, **MUST** require substance abuse assessment. §20-179(g) & (h)
- **SCRAM Device** §20-179 (h1-h3)
 - **NEW LAW effective 12-1-11** = May also impose 30 to ~~60 days~~ entire period of probation of abstinence, as verified by DOC approved device. ~~Cost of the device may not exceed \$1,000.~~

Aggravating Factors §20-179(d)

- Gross impairment of **0.15** or more
- Especially reckless or dangerous driving
- Negligent driving that led to a reportable accident
- Driving by the defendant while his driver's license was revoked
- Two or more prior convictions of a motor vehicle offense for which at least three points are assigned occurring within five years of the date of this offense **OR** one or more prior convictions of an offense involving impaired driving that occurred more than seven years before the date of this offense
- Conviction of speeding while fleeing or attempting to elude apprehension
- Conviction of speeding by the defendant by at least 30 miles per hour over the legal limit
- Passing a stopped school bus
- Any other factor that aggravates the seriousness of the offense

Mitigating Factors §20-179(e)

- Slight impairment solely from alcohol and the alcohol concentration did not exceed 0.09
- Slight impairment resulting solely from alcohol, with no chemical analysis having been available to the defendant
- Driving at the time of the offense that was safe and lawful except for the impairment
- A safe driving record, having no convictions for any motor vehicle offense for which at least four points are assigned within five years of the date of this offense
- Impairment caused primarily by a lawfully prescribed drug for an existing medical condition, and the amount of the drug taken was within the prescribed dosage
- Voluntary submission to a mental health facility for assessment after being charged with the impaired driving offense and, if recommended by the facility, voluntary participation in the recommended treatment
- Assessment, compliance with recommendations and maintaining 60 days of continuous abstinence, as proven by DOC approved device
- Any other factor that mitigates the seriousness of the offense

Weighing Aggravating and Mitigating Factors §20-179(f)

- If no Grossly Aggravating Factors, judge must weigh Aggravating and Mitigating Factors.
- **Level 3** = Aggravating outweighs Mitigating $A > M$
- **Level 4** = No Aggravating or Mitigating \emptyset
or Aggravating = Mitigating $A = M$
- **Level 5** = Mitigating outweighs Aggravating $M > A$

Sentencing for Levels 3, 4 & 5 §20-179(i), (j) & (k)

- **MAY** be suspended with these Probation Conditions:

<u>Level</u>	<u>Min</u>	<u>Max</u>	<u>Either or both Probation Conditions</u>
3	72 hrs	6 months \$1,000 fine	72 hours jail 72 hours C.S. or any combination
4	48 hrs	120 days \$500 fine	48 hours jail 48 hours C.S. or any combination
5	24 hrs	60 days \$200 fine	24 hours jail 24 hours C.S. or any combination

- If suspended, **MUST** require substance abuse assessment. §20-179 (all levels)

No Consolidation of Multiple DWI's (§20-179(f2))

Aiding and Abetting DWI §20-179(f1)

- Always a Level 5.
- No findings of factors needed.

Unsupervised Probation §20-179(r)

- Must be given unsupervised probation, **UNLESS** judge makes specific findings otherwise, if:
 - No DWI's within 7 years,
 - Level 3, 4 or 5 and
 - Obtained assessment and completed treatment.

Split Sentences and Report Dates §20-179(s)

- Hour for hour credit for service. §20-179(s)(1)
- If alcohol remains in body upon report, shall be refused entrance and reported back to court. §20-179(s)(2)
- Immediate service of sentence after hearing. §20-179(s)(3)
- No Jail Credit for First 24 Hours. §20-179 (p)(1)
- Credit for Inpatient Treatment. (§20-179(k1))
 - Inpatient facility operated or licensed by the State.
 - Defendant bears the cost unless trial judge orders that the costs be absorbed by the State.
 - Credit only allowed if treatment occurred after offense.

Appeal of DWI Case §20-38.7

- Remand of a DWI requires consent of the DA and Superior Court.
- Resentencing upon remand or withdrawal of appeal required. Completely different than EVERY other case. §15A-1431(g) & (h)

Habitual DWI

- Habitual impaired driving statute says, “[s]entences imposed under this subsection shall run consecutively with and shall commence at the expiration of any sentence being served.” §20-138.5

JAIL CREDIT

Credits Allowed §15-196.1

- The minimum and maximum term of a sentence shall be credited with and diminished by the total amount of time a defendant has spent, committed to or in confinement in any State or local correctional, mental or other institution as a result of the charge that culminated in the sentence. The credit provided shall be calculated from the date custody under the charge commenced and shall include credit for all time spent in custody pending trial, trial de novo, appeal, retrial, or pending parole, probation or post-release revocation hearing: Provided, however, the credit available herein shall not include any time that is credited on the term of a previously imposed sentence to which the defendant is subject.
 - A defendant is entitled to jail credit for periods of confinement prior to his conviction (or probation revocation) as long as:
 - The credit was not used on a previously imposed sentence.
 - The defendant was not serving another sentence during the same time period.
 - A defendant stops earning credit when he begins serving his active sentence.

Allowance in Cases of Multiple Sentences §15-196.2

- In the event time creditable under this section shall have been spent in custody as the result of more than one pending charge, resulting in imprisonment of more than one offense, credit shall be allowed as herein provided. Consecutive sentences shall be considered as one sentence for the purpose of providing credit, and the creditable time shall not be multiplied by the number of consecutive offenses for which a defendant is imprisoned. Each concurrent sentence shall be credited with so much of the time as was spent in custody due to the offense resulting in the sentence. When both concurrent and consecutive sentences are imposed, both of the above rules shall obtain to the applicable extent.
 - Concurrent Sentences
 - Use appropriate credit on each charge.
 - Consecutive Sentences
 - Any period that the defendant was confined on more than one charge is to be counted only once as credit toward the entire string of sentences.

Calculating Jail Credit

- Jail credit is computed by excluding the first day and including the last. See State v. Richardson, 245 S.E.2d 754 (1978).

Split Rule §15A-1351(a)

- [m]ay not exceed one-fourth the maximum sentence of imprisonment imposed for the offense, and no confinement other than an activated suspended sentence may be required beyond two years of conviction.

- In imposing a sentence of special probation, the judge may credit any time spent committed or confined, as a result of the charge, to either the suspended sentence or to the imprisonment required for special probation.
- A defendant who serves, pursuant to special probation, an active sentence is entitled to credit for that time on any sentence imposed upon revocation of probation. See *State v. Farris*, 336 N.C. 552 (1994).

Credit for Inpatient Treatment

- Defendant participating in a residential treatment program where his freedom was substantially limited was in "custody," for purposes of entitlement to a sentencing credit for time spent in the program. *State v. Hearst*, 356 N.C. 132 (2002).
- Specifically mentioned in DWI statute except for the new Aggravated Level 1. The judge may credit against the active sentence imposed on a defendant the time the defendant was an inpatient at the treatment facility, provided such treatment occurred after the commission of the offense for which the defendant is being sentenced. §20-179 (k1)

Credit on Amended Charge

- Use "as a result of the charge" language in §15-196.1.
 - May need to provide copies of warrants, police reports, etc. to show same charge.

House Arrest

- Does not constitute confinement in a state or local institution and does not qualify as time that can be credited against a defendant's sentence pursuant to this section. See *State v. Jarman*, 140 N.C. App. 198 (2000).

DWI Sentencing §20-179

- No Jail Credit for First 24 Hours. §20-179 (p)(1)
- The judge may credit against the active sentence imposed on a defendant the time the defendant was an inpatient at the treatment facility, provided such treatment occurred after the commission of the offense for which the defendant is being sentenced. §20-179 (k1)

Certificate of Credit §15-196.4

- The judge presiding shall determine the credits to which the defendant is entitled and shall cause the clerk to transmit to the custodian of the defendant a statement of allowable credits.

Order Providing Credit §15-196.4

- Upon reviewing a petition seeking credit not previously allowed, the court shall determine the credits due and forward an order setting forth the allowable credit to the custodian of the petitioner.
- See AOC form [AOC-CR-906M](#).

SENTENCING AND JAIL CREDIT ISSUES

North Carolina
Prisoner Legal Services, Inc.



1110 WAKE FOREST ROAD
RALEIGH, NC 27604
(919) 856-2200
jailcredit@ncpls.org

JAIL CREDIT STATUTES

§ 15-196.1 Credits allowed

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

Comment: A defendant is entitled to jail credit for periods of confinement prior to his conviction (or probation revocation) as long as the defendant was not serving another sentence during the same time period. A defendant stops earning credit when he begins serving his active sentence.

§ 15-196.2 Allowances in cases of multiple sentences

“In the event time creditable under this section shall have been spent in custody as the result of more than one pending charge, resulting in imprisonment of more than one offense, credit shall be allowed as herein provided. Consecutive sentences shall be considered as one sentence for the purpose of providing credit, and the creditable time shall not be multiplied by the number of consecutive offenses for which a defendant is imprisoned. Each concurrent sentence shall be credited with so much of the time as was spent in custody due to the offense resulting in the sentence. When both concurrent and consecutive sentences are imposed, both of the above rules shall obtain to the applicable extent.”

Comment: If the defendant receives concurrent sentences, each sentence is to be reduced for periods of confinement on charges that brought about the sentence. If a defendant receives consecutive sentences, any period the defendant was confined for more than one of the consecutive sentences is to be counted only once as credit toward the entire string of sentences.

Calculating Jail Credit

Jail credit is computed by excluding the first day and including the last. See *State v. Richardson*, 245 S.E.2d 754 (1978). The day of conviction date is not counted as jail credit because sentences begin on the date of conviction. N.C. Gen. Stat. § 15A-1353.

To determine the amount of jail credit a defendant will receive on his/her sentence or sentences you must answer two questions:

1. Is the defendant entitled to jail credit?
 - Was the defendant confined?
 - In a state or local facility?
 - On the charge he was convicted of?
 - Was the credit applied to a previously imposed sentence?
2. How will the jail credit be applied to his/her sentences?
 - Concurrent sentences
 - Consecutive
 - Concurrent and consecutive

1. IS THE DEFENDANT ENTITLED TO JAIL CREDIT?

- Was the defendant confined?

YES –

DART-Cherry – *State v. Lutz*, 177 N.C. App. 140, 628 S.E.2d 34 (2006).

IMPACT – *State v. Hearst*, 356 N.C. 552, 444 S.E.2d 124 (2002).

Split sentence/special probation – *State v. Farris*, 336 N.C. 552, 444 S.E.2d 182 (1994).

NO –

House arrest – *State v. Jarman*, 140 N.C. App. 198, 535 S.E. 2d 875 (2000).

Ex. 1. Defendant was held for 30 days prior to conviction. Upon conviction, he is given a 30 day split sentence and then 3 years of supervised probation. His probation is revoked. He was not held in jail prior to his probation revocation. How much jail credit is he entitled to upon revocation if

- a) The judge used his pre-trial confinement to satisfy the split sentence?

30 days – the jail credit was used to satisfy the split sentence and defendant gets credit for the split sentence.

- b) The judge did not give him the credit and he had to serve the 30 days?

60 days – credit for the split sentence and pretrial confinement.

- In a state or local facility?

YES –

County jail

Jail in another State – Defendants are entitled to credit for time spent in an out-of-state jail only if he was held solely on the North Carolina charge of which he is to be sentenced. The

defendant is not entitled to the credit if he was held under a NC charge and out-of state charge unless the out-of-state charge was dismissed. *Childers v. Laws*, 558 F. Supp. 1284 (W.D.N.C. 1983).

- Mental Hospital for pre-trial evaluation
- DART-Cherry
- Juvenile facility – IMPORTANT to take care of this at time of sentencing because records may be destroyed or transferred to Raleigh once defendant turns 18.

NO –

TROSA or Private rehabilitation facilities – Statute §15-196.1 includes only time spent in custody in “State” institutions. See *Childers v. Laws*, 558 F. Supp. 1284 (W.D.N.C. 1983).

Civil commitment to a mental hospital after defendant is found incompetent. – NCPLS litigated this issue. MAR was denied and Court of Appeals did not grant cert. petition. The State argued that defendant was civilly committed and therefore, not being held because of the charge. However, some attorneys have had trial judges grant this credit.

- On the charge he was convicted of?

Ex. 2. Defendant was arrested on January 1 for Attempted First-degree Murder and Assault With a Deadly Weapon Intent to Kill Inflicting Serious Injury. On January 2, defendant makes bond on assault charge, but remains in jail because he has not made bond on attempted murder charge. On June 1, he makes bond on the attempted murder charge. On August 1, he is convicted on assault charge. How much jail credit is he entitled to?

1 day. He was only held on the charge he was convicted of – assault – for one day.

- Was the credit applied on a previously imposed sentence?

*If a defendant serves a misdemeanor sentence in the county jail while awaiting conviction on another charge, upon conviction the days that he served the misdemeanor sentence cannot be credited to his sentence.

Ex. 3 Defendant was arrested on March 1 for Possessing Stolen Goods and Possession of Cocaine. He was convicted of both charges on May 11, 70 days later, and received 10 – 12 months in the DOC under the Possession of Cocaine charge. The judge ordered the defendant to serve 70 days in jail under the Possessing Stolen Goods charge, and the 70 days was counted as time-served. How much jail credit should he receive on the Possession of Cocaine charge?

None. The credit was used on a prior sentence of which he has already served.
N.C. Gen. Stat. §15-196.1.

*If a defendant is held on two charges, convicted on two separate dates, and he received jail credit on the first sentence, the Judge may refuse to give him credit on the second even if the charges are running concurrently because the credit was granted on a previously imposed sentence. NCPLS litigated this issue in Guilford County. We lost on the MAR and the Court of Appeals denied our cert. petition. Since some counties grant it and others don't, we usually ask for it.

Ex. 4. On July 1, Defendant was arrested on Possession of Stolen Goods and an old DWI charge. On September 1, defendant was convicted of Possession of Stolen Goods and given 61 days of jail credit. On September 15, he was convicted of DWI and the Judge ordered the sentence to run concurrently to the sentence for Possession of Stolen Goods. How much jail credit is defendant entitled to on the DWI conviction?

Depends on the county. Some counties will give the defendant 61 days jail credit because the defendant was held on the DWI and it's running concurrently with the Possession of Stolen Goods. N.C. Gen. Stat. §15-196.2 Some counties may not want to grant the credit because the time was given on a previously imposed sentence. Defendant is not entitled to jail credit from September 1 to 15, because at that point he was serving his sentence for Possession of Stolen Goods. N.C. Gen. Stat. §15-196.1

2. HOW WILL THE JAIL CREDIT BE APPLIED TO HIS/HER SENTENCES?

- Concurrent sentences

Concurrent sentences are sentences that start on the date of conviction. If the sentences are concurrent, a defendant serves more than one sentence at the same time. Below is an example of how concurrent sentence received on different dates are served.

Conviction

Date

Sentence

15 July 2000: _____ Sentence A _____

15 July 2001: _____ Sentence B _____

15 July 2002: _____ Sentence C _____

If defendant receives concurrent sentences each sentence is credited for the amount of time he was held on that charge. If the defendant was held longer on one charge than another, it is better to consolidate the convictions into one judgment than to run them concurrently.

Ex. 5. Defendant is arrested for a Breaking and Entering charge on July 1. On September 1, she is served with a Larceny charge. On November 1, she is convicted of both. How much jail credit does she receive if

a) she receives two concurrent sentences?

122 days on Breaking and Entering
60 days on Larceny

b) the two convictions are consolidated into one judgment?

122 days.

- Consecutive sentences

If a defendant receives consecutive sentences, he or she has to finish one sentence before he or she can start serving the next one. Below is an example of how consecutive sentences would be served regardless of whether defendant received the sentences on the same day or different days.

Sentence A \ Sentence B

Consecutive sentences are considered one sentence for the purpose of providing jail credit. All *shared* confinement is counted once toward all consecutive sentences.

Ex. 6. Defendant is held for 55 days on Breaking and Entering and Larceny before being convicted. How much jail credit does the defendant entitled to if she

a) receives two concurrent sentences?

55 days on Larceny
55 days on Breaking and Entering

b) receives two consecutive sentences?

55 days on **either** the Larceny **or** the Breaking and Entering.

Ex. 7. Defendant is arrested for Breaking and Entering on January 1. On February 1, while in jail for Breaking and Entering, he is served with an arrest warrant for Larceny. He is convicted on March 1. How much jail credit is he entitled to if he

a) receives concurrent sentences?

Breaking and Entering: January 1 to February 28 = 58 days
Larceny: February 1 to February 28 = 27 days

b) receives consecutive sentences?

58 days on either the B & E or Larceny

Ex. 8. The defendant was arrested on January 1, 2002 for manslaughter and common law robbery. On December 31, 2002, he received an active prison sentence for manslaughter. The judge ordered the defendant to serve probation for common law robbery immediately after his active prison sentence. The judge orders the 363 days of jail credit to be applied to the probation sentence. Is this a legal sentence?

Yes. The probation sentence is consecutive to the active sentence. Therefore, the jail credit can be applied to either. If the probation sentence is revoked he will get 363 days of credit.

- Concurrent and consecutive sentences

“When both concurrent and consecutive sentences are imposed, both of the above rules shall obtain to the applicable extent.”
N.C.G.S. § 15-196.2

Ex. 9 On March 1, 2003 and March 20, 2003, Defendant committed the offenses of Larceny and Possession of Schedule II. He was arrested on March 20, 2003 and released on bond on May 9, 2003. He was arrested again on July 24, 2003 for Breaking and Entering and on the previous Larceny charge. He was released on July 31, 2003. On October 6, 2003, he received a 60 day split-sentence in the County jail and 36-48 months on probation under the Larceny and Breaking and Entering. His sentence was modified on February 1, 2004. He was ordered to the DART-Cherry program. He remained in the County jail until he was transferred to DART-Cherry. On December 13, 2005, he was arrested for assault and the previous Larceny and B & E charges. He received an active sentence on all three convictions on January 9, 2006.

Offense	Arrested	Released	# of days	
1. Larceny	03/20/03	05/09/03	50	
2. B & E + 1	07/24/03	07/31/03	07	
3. 1 + 2	10/06/03	12/05/03	60	
4. 1 + 2	02/01/04	03/01/04	28	
5. 1 + 2	03/01/04	05/30/04	90	(DART-Cherry)
6. Assault + 1 + 2	12/13/05	01/13/06		
	<i>Convicted</i>	<i>01/09/06</i>	26	

A. The Larceny and B & E convictions are concurrent. The Assault conviction is consecutive to the Larceny. How much credit should he receive on each sentence?

Larceny	261 days
B & E	211 days
Assault	none

B. The Larceny and B & E convictions are concurrent. The Assault conviction is consolidated with the B & E conviction.

Larceny	261
B & E	211

C. All three convictions are concurrent.

Larceny	261
B & E	211
Assault	026

D. All three are consecutive.

Larceny	261
B & E	none
Assault	none

Working with Combined Records

- Any language written on the back of the judgment after “The Court further recommends:” Combined Records will consider a recommendation and if it is contrary to statute, they will not follow it. For example, if part of the plea agreement is that a Habitual Felon conviction runs concurrently with a previous conviction, this must be expressly written on the front of the judgment. If it is on the back, Combined Records will consider it only a recommendation and run the two sentences consecutively.

Hamilton v. Freeman, 147 N.C. App. 195, 554 S.E.2d 856 (2001). Before *Hamilton v. Freeman*, when the Department of Correction received a Judgment and Commitment from the Court which ordered a concurrent sentence for a crime that under NC statutes required a consecutive sentence, DOC simply entered the sentence as consecutive, without notifying anyone. Under *Hamilton*, when the DOC receives a judgment ordering a concurrent sentence for a crime that under NC statutes requires a consecutive sentence, they must notify the inmate and the sentencing judge that the sentence is wrong and needs to be corrected. The DOC cannot simply enter the sentence as a consecutive sentence, but must wait for the judge to resentence the inmate and enter a corrected judgment.

- Combined Records will enter *nunc pro tunc* (now for then) judgments if it is written on the front of the judgment. If a defendant is being resentenced, date of judgment can effect the projected release date.

Defendant was convicted as a Habitual Felon and received a 7 year sentence on April 5, 2001. Eight felonies were consolidated under the Habitual Felon conviction. Defendant had served four years of his sentence when he wrote to NCPLS because his Habitual Felon indictment was defective. The Assistant District Attorney agreed to vacate the Habitual Felon indictment and sentence defendant to 4 consecutive 12-to-15-month sentences.

Defendant has four years of jail credit so we thought he would be released immediately because he had worked down to his minimum. When the Habitual Felon conviction was vacated, the date on his new judgment was October 12, 2005, the date he was resentenced, not April 5, 2001, when he was originally convicted. Combined Records calculated his sentence as beginning in 2005. Under structured sentencing, defendants enter at their maximum sentence and work down to their minimum. Instead of using 12 months worth of jail credit to complete each of the first three sentences, it took 15 months. Only three months of jail credit remained to be applied to his final 12-month sentence, which began on October 12, 2005. The defendant had to serve 12-month minimum minus jail credit. As a result, the client lost at least three months of earned time, if not more. If the judge “*nunc pro*

tuned” the judgments to the original conviction date, the defendant would have worked down to his minimum and would not lose the benefit of his earned time.

*However, it may depend on who is entering the sentence. I have had one person who will correct the computer and make sure the person receives the maximum benefit of jail credit and earned time. It's worth calling Combined Records and talking to the person entering the new sentence.

A nunc pro tunc judgment can also be used to make a habitual felon sentence run concurrently with a previously imposed sentence if the habitual felon judgment is “nunc pro tunc” to the same date as the previously imposed sentence.

- Follow up with Combined Records. If a defendant is resentenced and getting close to his projected release date, call Combined Records and make sure they have a certified copy of the judgment and know that your client will be a holdover.

FREQUENTLY ASKED QUESTIONS FROM INMATES –

1. I was convicted on September 1, but remained in the county jail until September 15. Can I get jail credit for the time between conviction and being transferred to the DOC?

No, your sentence begins once you are convicted no matter where you are housed so you were no longer entitled to jail credit after September 1 because that's when you began serving your sentence.

§ 15A-1353(a)

When a sentence includes a term or terms of imprisonment, the court must issue an order of commitment setting forth the judgment. Unless otherwise specified in the order of commitment, the date of the order is the date service of the sentence is to begin.

2. I was sentenced to 8 to 10 months and given two months of jail credit, but when I got to the DOC they had not changed my sentence to 6 to 8 months.

The DOC does not change your sentence. Your jail credit is subtracted from your minimum and maximum when the DOC calculates your projected release date.

3. I have concurrent sentences, but I did not receive the same amount of jail credit on each sentence.

To receive the same amount of credit on concurrent sentences you have to be held on both of the charges for the same amount of time.

4. I received a four-month split sentence. I spent three months in the county jail prior to being convicted. Why didn't the Judge give me my jail credit?

The Judge decides whether to use pre-trial confinement to satisfy a split sentence. You are not entitled to this time unless you are revoked.

5. I want my jail credit applied to my minimum instead of my maximum.

Jail credit is applied to the minimum and maximum. Inmates enter into DOC custody under their maximum sentence and have the opportunity to work down towards their minimum sentence.

Ex. 8

The defendant received 6-8 months for Breaking and Entering. He has 30 days of jail credit. Upon entering the DOC, he should have a projected release date that is scheduled at 7 months.

2. If he is able to earn 30 days of gain time, when will he be released?

At 6 months

3. If he is able to earn 60 days of gain time, when will he be released?

At 5 months

*This inmate cannot earn more than 60 days of gain time. An inmate cannot earn credit past the minimum sentence.

6. I was held as a fugitive from justice in another state prior to being expedited to a county jail in North Carolina. Why was I not given credit for time spent in the out-of-state jail?

Defendants are entitled to credit for time spent in an out-of-state jail only if he was held solely on the North Carolina charge of which he is to be sentenced. The defendant is not entitled to the credit if he was held under a NC charge and out-of state charge unless the out-of-state charge was dismissed. If the defendant is entitled to the credit, the credit is calculated from the date on the NC warrant.

7. Can I get DOC earn time for the work I performed in the county jail?

The Department of Correction (DOC) is not legally obligated to award gain time which was earned while the inmate was not under state supervision. *Childers v. Laws*, 558 F. Supp. 1284 (W.D.N.C. 1983). Further, there is no constitutional right to gain time. According to N.C. Gen. Stat. §15A-1355(c), an inmate *may* earn credit against their sentence; however, there is no requirement for the DOC to provide credit.

The DOC Policy and Procedures Manual states:

In a case of inmates assigned to local confinement facilities pursuant to Court Commitment, the Sheriff or Administrator at the local confinement facility shall establish procedures for granting, approving, and documenting sentence reduction

credit awards. In the case of inmates confined to local confinement facilities pursuant to a contractual agreement with the Department of Correction, the Sheriff or Administrator shall forward recommendations for sentence reduction credit awards to the Contractual Housing Section of the Division of Prisons for final review and action as appropriate.

There are no legal grounds for requesting gain time credit for work done while in the county jail. It is up to the DOC whether to provide that credit.

DWI CHEAT SHEET

Effective for offenses on or after 12-1-11 Applies only to offenses prior to 12-1-11

Levels: (§20-179(c-k)) AOC-CR-311

Agg 1= 3 or more Grossly Aggravating Factors

1= 2 Grossly Aggravating Factors, OR factor involving age/disability

2= 1 Grossly Aggravating Factor (other than factor involving age/disability)

3=Aggravating outweighs Mitigating A>M
4=No Aggravating or Mitigating Ø
or Aggravating=Mitigating A=M
5=Mitigating outweighs Aggravating M>A

Sentences: (§20-179(g-k)) AOC-CR-310 & 342

Level Maximum Sentence Mandatory Minimum Sentence

Agg 1 36 months 120 days (g)
 \$10,000
1 24 months 30 days (g1)
 \$4,000
2 12 months 7 days (h)
 \$2,000

MAY require that they abstain from alcohol for period of 30 days to 60 days full term of probation, as verified by DOC approved device. Cost not to exceed \$1,000. (§20-179 (h1))

Level Minimum Maximum Sentence Probation Conditions
3 72 hrs 6 months 72 hours jail (i)
 \$1,000 72 hours C.S.
 or any combination
4 48 hrs 120 days 48 hours jail (j)
 \$500 48 hours C.S.
 or any combination
5 24 hrs 60 days 24 hours jail (k)
 \$200 24 hours C.S.
 or any combination

If suspended, **MUST** require abuse asmt and treatment (§20-179, all levels)
No Jail Credit for First 24 Hours (§20-179 (p)(1))
 Hour for Hour service/Weekends/Report in Sober Condition (§20-179(s))
 Credit for Inpatient Treatment (§20-179(k1)) **Except for Level Agg 1**
 No Consolidation of Multiple DWIs (§20-179(f2))
 Aiding and Abetting conviction is always **LEVEL 5** (§20-179 (f1))
 Any active sentence **MUST** be in local jail unless second or subsequent DWI (§20-176(c1))

Limited Driving Privilege Eligibility: (§20-179.3) AOC-CR-312

Valid license or license that had been expired for less than 1 year
No prior impaired driving convictions w/in 7 years of offense date
Level Three, Four, or Five was imposed
Not a refusal

After offense, not been convicted of or have unresolved DWI charge
 Obtained and filed with the court a **substance abuse assessment** **NEED**

- Letter on letterhead for nonstandard working hours (STD hours 6:00 A.M. to 8:00 P.M. Mon through Fri)
- DL-123 or DL-123A from Ins. Co. (Only good for 30 days)
- Substance abuse assessment
- \$100 filing fee

Allows maintenance of household during standard hours
 Does not allow community service/ assessment and treatment at listed times

Refusal Privilege: (§20-162 (c1)) AOC-CR-313

Same as above but also; **No prior refusals** w/in 7 years

No death or critical injury

Final disposition

Complied with one **condition of suspended sentence**

Revoked at least 6 months

Completed training or treatment per assessment

Does not allow maintenance of household/ CS, asmt or tmt at any time

Interlock: (§20-179.3 (e5)) required when 0.15 or more **AOC-CR-340**

§20-179.3 (c1) requires 45 day waiting period for LDP

Interlock info: www.monitechnc.com 1-800-521-4246

Does not allow maintenance of household or CS/ does allow asmt and tmt at listed time

DWI Regs: 10A N.C.A.C. 41B .0101 - 41B .0503

Preventive Maintenance and Permits (§20-139.1 (b2); (b6))

www.ncpublichealth.com/chronicdiseaseandinjury/fla/history.htm

POST 12-1-06 ISSUES

Pre-Trial Motion Practice (§20-38.6)

Checking Stations and Roadblocks (§20-16.3A)

Blood Test Chain of Custody (§20-139.1 (c3))

BLAKELY CURE in District Court (§20-179(a)(1) & (2); (c))

State must prove Grossly Aggravating or Aggravating Factors beyond a reasonable doubt at sentencing hearing or may use evidence from trial

BLAKELY CURE in Superior Court (§20-179(a1), (a2) & (c))

For notice, see **AOC-CR-338**

10 year look back period on Habitual DWI (§20-138.5 (a))

MELENDEZ-DIAZ CURE (20-139.1(c1), (c3), (e1) & (e2)) (Effective for offenses committed on or after 10-1-09) **AOC-CR-344**

Appeals and Withdrawal/Remand (§20-38.7)

GROSSLY AGGRAVATING FACTORS (§20-179 (c))

- A conviction for an offense involving impaired driving within seven years of the date of this offense (See §20-179 (c) re: rebutting priors)
- Each prior conviction is a separate grossly aggravating factor
- District court conviction that is appealed and either withdrawn or remanded BUT not yet resentenced
- The defendant's driver's license was revoked for an impaired driving offense at the time of this offense
- Serious injury to another person caused by the defendant's impaired driving at the time of this offense
- A child under the age of 16 18, mental development of a child under 18, or physical disability preventing unaided exit was in the vehicle at the time of this offense

AGGRAVATING FACTORS (§20-179 (d))

- Gross impairment of 0.15 or more
- Especially reckless or dangerous driving
- Negligent driving that led to a reportable accident
- Driving by the defendant while his driver's license was revoked
- Two or more prior convictions of a motor vehicle offense for which at least three points are assigned occurring within five years of the date of this offense OR one or more prior convictions of an offense involving impaired driving that occurred more than seven years before the date of this offense
- Conviction of speeding while fleeing or attempting to elude apprehension
- Conviction of speeding by the defendant by at least 30 miles per hour over the legal limit
- Passing a stopped school bus
- Any other factor that aggravates the seriousness of the offense

MITIGATING FACTORS (§20-179 (e))

- Slight impairment solely from alcohol and the alcohol concentration did not exceed 0.09
- Slight impairment resulting solely from alcohol, with no chemical analysis having been available to the defendant
- Driving at the time of the offense that was safe and lawful except for the impairment
- A safe driving record, having no convictions for any motor vehicle offense for which at least four points are assigned within five years of the date of this offense
- Impairment caused primarily by a lawfully prescribed drug for an existing medical condition, and the amount of the drug taken was within the prescribed dosage
- Voluntary submission to a mental health facility for assessment after being charged with the impaired driving offense and, if recommended by the facility, voluntary participation in the recommended treatment
- Assessment, compliance with recommendations and maintaining 60 days of continuous abstinence, as proven by DOC approved device
- Any other factor that mitigates the seriousness of the offense

Class A1

Assault by Pointing Gun (14-34)
 Assault Inflicting Serious Injury (14-33)(c)(1))
 Assault on a Child Under 12 (14-33)(c)(3))
 Assault on a Female (14-33)(c)(2))
 Assault on Firefighter/EMS (14-34.6) F
 Assault on Gov. Off (14-33)(c)(4)) F
 * Assault on Handicapped Person (14-32.1)
 Assault on School Pers (14-33)(c)(6)) F
 Assault with a Deadly Weapon (14-33)(c)(1))
 Assault and pers rel in presence of minor (14-33 (d))
 Child Abuse (14-318.2) F
 Death by Vehicle (20-141.4) On or after 12-1-09
 Food Stamp Fraud \$100-\$500 (108A-53.1)
 Ind Lib by School Personnel, not Teacher (14-202.4)
 Interfering with Emergency Comm (14-286.2)
 Patient Abuse (14-32.2) F
 @ Secret Peeping #2 or w/ photo device (14-202) F
 Sex with Student by School, not Teacher (14-27.7)
 @ & * Sexual Battery (14-27.5A)
 * Stalking (14-277.3) Felony if prior or while 50B/C
 Unfair Trade of Cigarettes (14-401.18)
 Violation of 50B Order (50B-4.1) F

Class 1

Alcohol offense, not otherwise specified (18B-102(b))
 Altering Serial Number (14-160.1)
 Assault on Sports Official (14-33)
 Blackmail (14-118)
 Breaking or Entering (14-54) F
 B&E Coin Operated Machine (14-56.1) F
 Communicating Threats (14-277.1)
 Contrib to Delinq of Juvenile (14-316.1)
 Criminal Domestic Trespass (14-134.3) F
 Damaging Computers < \$100 (14-455) F
 Death by Vehicle (20-141.4) F Prior to 12-1-09
 Disorderly Conduct #2 (14-288.4) F

* Subject to DNA sample (15A-266.4)

@ Potential Sex Offender Registry (14-208.7)

DV / knowing female is pregnant is 1 class higher. If A1, becomes class I felony (14-18.2)

50B Viol w/ 3 priors becomes a Class H felony

50B Viol w/ Deadly Weapon / Class H felony

Hab Misd Assault Class H Felony (14-33.2)

14-33 & physical inj or 14-34; & 2 or > assault conv

Assault by strangulation Class H felony (14-32.4)

F = possible felony enhancement (review statute)

Committed because of race, color, religion,

nationality or country of origin

Class 2 or 3 becomes Class I Class A1 or 1 becomes

Class H Felony (14-3)

DWLR (20-28)
 Escape by Misdemeanor (148-45) F
 ESC Violation (96-18)
 Ethnic Intimidation (14-401.14) F (See 14-3)
 Failure to File State Tax Return (105-236) F
 Failure to Stop for School Bus (20-217)
 Failure to Yield Emerg Veh w/Damage (20-156, 57) F
 False Imprisonment (Common Law)
 Food Stamp Fraud < \$100 (108A-53) F
 Forgery (Common Law)
 Going Armed to the Terror (Common Law)
 Hit and Run Property Damage (20-166) F
 Inciting a Riot (14-288.2) F
 Injury to Personal Property >200 (14-160(b))
 Injury to Real Property (14-127)
 Injury to Trees, Crops, Lands (14-128)
 Larceny \$1000 or Less (14-72) F
 Loitering for Prostitution (14-204.1)
 Misuse of 911 (14-111.4) w/ intent >\$100
 Obstruction of Justice (Common Law)
 Passing Stopped School Bus (20-217) F
 Picketing Courthouse (14-225.1)
 Possession Weapon on School Grounds (14-269.2) F
 Possession of Drug Paraphernalia (90-113.22)
 Possession of M/I > ½ oz (90-95) F
 Possession Stolen Goods (14-72) F
 Prearranged Racing (20-141.3)
 Prostitution / Maintaining Place (14-204 & 208)
 Receiving Stolen Goods (14-72) F
 Secret Peeping (14-202) F
 Shoplifting #3 w/in 5 Yrs (14-72.1) F
 Speeding to Elude (20-141.5) F
 Soliciting for Prostitution (14-204 - 208) F
 Toxic Fumes Violations (90-113.10-13)
 Unauthorized Use of Motor Vehicle (14-72.2) F
 Unlawful Assembly (Common Law)
 Welfare Fraud (108A-39) F
 Worthless Check \$2000 or Less 4th Conv (14-107) F
 Worthless Check/Closed Account (14-107(d)(4)) F

Class 2

Adult Establishment Viol #2 (14-202.11-12)
 Carrying Concealed Weapon (14-269 & 14-415.21) F
 Cyberstalking (14-196.3)
 Defacing Public Property (14-132)
 Defrauding Innkeeper (14-110)
 Disorderly Conduct (14-288.4) F
 Driving After Consuming <21 (20-138.3)
 Driving w/ Open Cont Alcoh in System #2 (20-138.7)
 Failure to Disperse (14-288.5)
 Failure to Notify DMV of Address Change (20-7.1)
 Failure to Work After Being Paid (14-104)
 Failure to Return Rental Property (14-167) F
 Failure to Yield/Stop Emerg Veh (20-156, 57) F

Filing False Police Report (14-225)
 Financial Card Fraud <500 w/in 6 mos. (14-113.13) F
 Fornication / Adultery (14-184)
 Furnishing False Information (20-29)
 Gambling (14-291-292)
 Harassing Phone Calls (14-196)
 Hit and Run Failure to Notify (20-166.1)
 Indecent Exposure (14-190.9) F
 Injury to Personal Property \$200 or Less (14-160(a))
 Littering #2 (14-399) F
 Lottery Viol (14-289-291)
 Motor Vehicle Law, not otherwise specified (20-35 & 20-176)
 NOL (20-7(a) & 20-35)
 Obtaining Property by W/C (14-106)
 Open Container 2nd or > Off (20-138.7(a))
 Possession of Handgun by Minor (14-269.7)
 Reckless Driving (20-140)
 Resisting/Obstructing Officer (14-223)
 Scalping (14-344)
 Setting Fire to Woods (14-137)
 Shoplifting #2 w/in 3 Yrs (14-72.1) F
 Simple Assault/Battery/Affray (14-33)
 Soliciting for CAN (Common Law)
 Tampering with M/V (20-107)
 Trespass, 1st Degree (14-159.12)
 Willful Racing (20-141)
 Worthless Check \$2000 or Less (14-107) F

Class 3

Adult Establishment Viol (14-202.11-12)
 Driving Commercial Vehicle after Cons (20-138.2A)
 Driving w/ Open Cont Alcohol in System (20-138.7)
 Fishing Without License (133-271)
 Hunting Without License (133-270.2)
 Intoxicated and Disruptive (14-444)
 Littering (14-399(a)) F
 Misuse of 911 (14-111.4)
 Open Container 1st Offense (20-138.7(a))
 Permitting Bitch at Large (67-2)
 Possession of M/I ≤ ½ oz (90-95) F
 Shoplifting (14-72.1) F
 Trespass, 2nd Degree (14-159.13)
 Unsealed Wine/Liquor in Passenger Area (18B-401(a))
 Using Profane Language on Roadway (14-197)
 Violation of City or County Ord (14-4)

Infraction

CCW w/permit not on person 1st offense (14-415.21)
 Cell Phone <18 (20-137.3)
 Littering (14-399(a1))
 Open Container Passenger (20-138.7(a1))
 Seatbelt Violations (20-135.2A(e)) fine & cost limits
 Speedometer Violations (20-123.2)
 Violation of Ord re: operation of vehicles (14-4(b))

Multiple Prior Convictions §15A-1340.21(d) [If an offender is convicted of more than one offense in a single session of district court, or in a single week of superior court or of a court in another jurisdiction, only one of the convictions may be used to determine the prior conviction level.]

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

Concurrent and Consecutive Terms §15A-1354(a) Unless specified or required by statute to run consecutively, sentences shall run concurrently.

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

Sentences of Imprisonment §15A-1351(a) Split sentence may not exceed one fourth the maximum sentence of imprisonment imposed for the offense. "[T]he judge may credit any time spent committed or confined, as a result of the charge, to either the suspended sentence or to the imprisonment required for special probation."

Restitution Statutes §15A-1340.34 - 38 Basis, Determination, Defendant's Ability to Pay, Partial Restitution and Enforcement.

Standard Probation Lengths §15A-1343.2 Community Punishment 6-18 months / Intermediate Punishment 12-24 months.

Probation Hearing/Probable Cause Hearing §15A-1345(c) must be held within seven working days of an arrest. Otherwise, must be released.

"[P]rovided that probation may not be revoked solely for conviction of a Class 3 misdemeanor. §15A-1344(d)

Conspiracy & Attempt (§14-2.5) = 1 lower **Solicitation** (§14-2.6) = class 3 misdemeanor (unless specified) **Aid and Abet & Acting in Concert** = same punishment

CLASS	PRIOR CONVICTION LEVELS		
	I	II	III
	Ø Priors	1 to 4 Priors	5 or > Priors
A1	1-60 days C/I/A	1-75 days C/I/A	1-150 days C/I/A
1	1-45 days C	1-45 days C/I/A	1-120 days C/I/A
2	1-30 days C	1-45 days C/I	1-60 days C/I/A
3	1-10 days C	1-15 days C/I	1-20 days C/I/A

COMMUNITY

§15A-1340.11(2)
 Does not include ACTIVE
 OR Drug Ct
 OR Special Prob / Split under
 §15A-1351(a)
 MAY include 1 or > under
 §15A-1343(a1)
 House Arrest with Electronic
 Monitoring
 Community Service
 Confinement of 2/3 days (<6 days
 per month) during 3 separate months
 Substance Abuse Assmt,
 Monitoring or TntEdu or Vocational
 Skills Development Program
 Satellite-based Monitoring (if
 covered under 14-208.40(a)(2))

INTERMEDIATE

§15A-1340.11(6)
 Placed on Supervised Probation.
 MAY include:
 Drug Treatment Court
 Special Prob / Split §15A-1351(a)
 Residential Program
 Intensive Supervised Probation
 Day Reporting Center
 CP conditions under §15A-1343(a1)
FINES §15A-1340.23(b)
 Unless specified by offense:
 Class A1 = discretion of court
 Class 1 = discretion of court
 Class 2 = \$1,000
 Class 3 = \$200
 MV Infraction = \$100 §20-176(b)
 Local Ordinance \$500/\$50 §14-4

DELEGATION TO

PROBATION

UNLESS SPECIFIC FINDING TO BE INAPPROPRIATE §15A-1343.2(e)
 Probation may require:
 20/50 hours of Community Service + fee
 Report to Probation more frequently
 Substance Abuse Assmt, Monitoring or Tnt
 House Arrest with Electronic Monitoring
 Confinement of 2/3 days (<6 days per
 month) during 3 separate months
 Curfew with Electronic Monitoring Device
 Edu or Vocational Skills Development
 Program
REQUIRES
 Admin Review and Approval by Chief PO
 MAY FILE MOTION to review
 UNLESS signed a WAIVER

CLASS	EFFECTS OF CONVICTION		
	Level I	Level II	Level III
	No Priors	One to Four Priors	Five or More Priors
A1	1-60 days C/I/A *WILL count for felony points* WILL revoke probation CAN use up jail credit CAN be used as impeachment	1-75 days C/I/A *WILL count for felony points* WILL revoke probation CAN use up jail credit CAN be used as impeachment	1-150 days C/I/A *WILL count for felony points* WILL revoke probation CAN use up jail credit CAN be used as impeachment
1	1-45 days C *WILL count for felony points* WILL revoke probation CAN use up jail credit CAN be used as impeachment	1-45 days C/I/A *WILL count for felony points* WILL revoke probation CAN use up jail credit CAN be used as impeachment	1-120 days C/I/A *WILL count for felony points* WILL revoke probation CAN use up jail credit CAN be used as impeachment
2	1-30 days C Will NOT count for felony points WILL revoke probation CAN use up jail credit CAN be used as impeachment	1-45 days C/I Will NOT count for felony points WILL revoke probation CAN use up jail credit CAN be used as impeachment	1-60 days C/I/A Will NOT count for felony points WILL revoke probation CAN use up jail credit CAN be used as impeachment
3	1-10 days C Will NOT count for felony points Will NOT revoke probation CAN use up jail credit CANNOT be used as impeachment	1-15 days C/I Will NOT count for felony points Will NOT revoke probation CAN use up jail credit CANNOT be used as impeachment	1-20 days C/I/A Will NOT count for felony points Will NOT revoke probation CAN use up jail credit CANNOT be used as impeachment

FELONY POINTS §15A-1340.14(b)(5)

- *For purposes of this subsection, misdemeanor is defined as any Class A1 and Class 1 *nontraffic* misdemeanor offense, [except for] impaired driving (G.S. 20-138.1), impaired driving in a commercial vehicle (G.S. 20-138.2), and misdemeanor death by vehicle (G.S. 20-141.4(a2)), *but not any other misdemeanor traffic offense* under Chapter 20 of the General Statutes.*

PROBATION §15A-1344(d)

- ... [P]rovided that probation may not be revoked solely for conviction of a Class 3 misdemeanor.
- What about No Contest Pleas? What about Alford Pleas? What about PJC's? What about "Case II Probation"?

JAIL CREDIT §15-196.1

- Provided, however, the credit available herein shall not include any time that is credited on the term of a previously imposed sentence to which a defendant is subject.
- Beware of mandatory consecutive sentences in Habitual DWI, Habitual Felon, Habitual Violent Felon and Chapter 90 traffickings.
- Habitual DWI statute states, "[s]entences imposed under this subsection shall run consecutively with and shall commence at the expiration of any sentence being served." §20-138.5

IMPEACHMENT ON CROSS §8C-1, Rule 609(a)

- For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a felony, or of a Class A1, Class 1, or Class 2 misdemeanor, shall be admitted if elicited from the witness or established by public record during cross-examination or thereafter.
- Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

CLASS	PRIOR CONVICTION LEVELS		
	I	II	III
	Ø Priors	1 to 4 Priors	5 or > Priors
A1	1-60 days C/I/A	1-75 days C/I/A	1-150 days C/I/A
1	1-45 days C	1-45 days C/I/A	1-120 days C/I/A
2	1-30 days C	1-45 days C/I	1-60 days C/I/A
3	1-10 days C	1-15 days C/I	1-20 days C/I/A

COMMUNITY PUNISHMENTS

15A-1340.11(2)

Does not include ACTIVE

OR Drug Ct

OR Special Prob / Split under
15A-1351(a).

MAY include 1 or > under

15A-1343(a1):

House Arrest with Electronic
Monitoring

Community Service

Confinement of 2/3 days (<6 days per
month) during 3 separate months

Substance Abuse Assmt,

Monitoring or Tmt

Edu or Vocational Skills

Development Program

Satellite-based Monitoring

(if covered under 14-208.40(a)(2))

INTERMEDIATE PUNISHMENTS

§15A-1340.11(6)

Placed on Supervised Probation.

MAY include:

Drug Treatment Court

Special Probation / Split 15A-1351(a)

Residential Program

Intensive Supervised Probation

Day-Reporting Center

CP conditions under 15A-1343(a1)

FINES §15A-1340.23(b)

Unless specified by offense:

Class A1 = discretion of court

Class 1 = discretion of court

Class 2 = \$1,000

Class 3 = \$200

MV Infraction = \$100 §20-176(b)

Local Ordinance \$500/\$50 §14-4

DELEGATION TO PROBATION

UNLESS SPECIFIC FINDING TO
BE INAPPROPRIATE 15A-1343.2(e)

Probation may require:

20/50 hours of Community Service
+ fee

Report to Probation more frequently

Substance Abuse Assmt,

Monitoring or Tmt

House Arrest with Electronic
Monitoring

Confinement of 2/3 days (<6 days per
month) during 3 separate months

Curfew with Electronic Monitoring
Device

Edu or Vocational Skills

Development Program

REQUIRES

Admin Review and Approval by Chief
PO

MAY FILE MOTION to review
UNLESS signed a WAIVER

Your client has the following prior record:

<u>DATE</u>	<u>OFFENSE</u>	<u>JUDGMENT</u>
• 9-14-11	Speeding 51/35	Cost
• 2-15-05	DWLR	PJC
• 3-6-06	Felony Larceny	Prob
• 6-21-07	PV (fel. Lar)	Revoked
• 3-9-06	R/O (sup ct)	Prob
• 1-29-01	City Code Viol.	Fine
• ???	Contempt	30 days
• 4-13-06	Infraction	Fine
• 10-30-09	Permitting Bitch at Large	

Under N.C.G.S. §67-2 ?

How many points?

What is the record level?