FREQUENTLY ASKED QUESTIONS ON JUSTICE REINVESTMENT

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GENERAL QUESTIONS

1. What is the effective date of the JRA?

Different aspects of the JRA became effective at different times. The chart available here summarizes all of the law's effective dates.

2. Can you elect to serve a sentence after JRA?

No, as discussed in this blog post.

3. Does the JRA apply to DWI cases?

Some portions of the law do apply to impaired driving, and some portions do not. For example, DWI sentences are excluded from the Statewide Misdemeanant Confinement Program, whereas DWI probationers are subject to the JRA's limits on probation revocation authority under G.S. 15A-1341(a).

The chart available here indicates which aspects of the JRA apply to DWI cases and which do not.

4. Who is responsible for keeping track of all the different types of jail credit created by the JRA?

Ultimately, under G.S. 15-196.4, the statutory responsibility for determining jail credit rests with the court. In the interest of sharing information related to jail credit, Community Corrections has decided as

a matter of policy (§ E.0205(b)(1)) to file copies of quick dip delegated authority violation reports with the clerk in the county of supervision and, if it is different, the county of origin.

5. Did the JRA repeal tolling?

The JRA itself did not repeal tolling, but other legislation from 2011 did. S.L. 2011-62 repealed tolling for persons placed on probation on or after December 1, 2011.

For defendants placed on probation before that date, the applicable tolling law differs based on the date of the offense for which the defendant was placed on probation. If the offense date was before December 1, 2009, the tolling law set out in former G.S. 15A-1344(d) applies. Under that law, probation is tolled for any charge other than a Class 3 misdemeanor, and no credit is applied to the defendant's probation period even if the charge is dismissed or the defendant is acquitted.

If the offense date was after December 1, 2009, a revised version of the law, set out in former G.S. 15A-1344(g), applies. The revised law provided that if a probationer whose case was tolled for a new charge was acquitted or had the charge dismissed, he or she would receive credit against the probation period for the time spent under supervision in tolled status. This issue is addressed in this blog post.

FELONY SENTENCING, POST-RELEASE SUPERVISION, AND ADVANCED SUPERVISED RELEASE

6. What is the effective date of the changes to the felony sentencing grid?

The latest version of the sentencing grid, including the table of maximums for Class B1–E sex crimes, applies to offenses committed on or after December 1, 2011. All versions of the sentencing grid back to 1994 are available here.

7. Which sentencing law applies for a single offense with a range of offense dates that spans December 1, 2011?

When a crime has allegedly been committed over a range of dates both before and after December 1, 2011, the defendant generally should be sentenced under the law that results in the less severe sentence. *See* State v. Poston, 162 N.C. App. 642, 651 (2004) (applying that rule to a crime committed over a range of dates that crossed the Fair Sentencing-to-Structured Sentencing transition). A more complete discussion of this issue can be found in this blog post.

8. Can offenses committed before and after December 1, 2011, be consolidated for judgment?

Probably, as discussed in this blog post.

9. Do increased maximum sentences allow the court to impose a longer split sentence?

Probably. Confinement for a split sentence may not exceed one-fourth of the defendant's maximum imposed sentence. G.S. 15A-1351(a). The increased time added onto felony sentences by the JRA is part of the maximum sentence, even if it was intended primarily to allow for post-release supervision.

10. Can an inmate refuse PRS?

No. G.S. 15A-1368.2(b).

11. How long is a defendant's period of post-release supervision?

As summarized in this chart, the length of a felon's period of post-release supervision is 9, 12, or 60 months, as dictated by his or her offense class; offense date; and whether or not he or she is being supervised for a crime that requires registration as a sex offender.

12. Do drug trafficking defendants get post-release supervision?

For offenses committed on or after December 1, 2012, yes. For earlier offenses the answer is less clear, as described in this blog post.

13. What should be done if a person's jail credit makes him or her immediately eligible for release onto post-release supervision?

If, at the point of revocation, a probationer already has sufficient jail credit to bring him or her within 9 months of the maximum sentence (or within 12 months of the maximum in the case of a Class B1–E felon, or within 60 months of the maximum in the case of a Class B1–E sex offender, as the case may be), then he or she is eligible for immediate release onto post-release supervision, which may be arranged through coordination with the prison system and the Post-Release Supervision and Parole Commission.

14. Is it possible to receive probation for a conviction sentenced under the new habitual felon law?

Yes. With the four-class enhancement in place, some Class E habitual felons will be eligible for probation according to the felony sentencing grid.

15. Does the new habitual felon law offer relief to anyone previously sentenced under the old law?

No. The revised law applies to substantive felonies that occur on or after December 2011, but expressly does not affect prosecutions based on offenses committed before that date. S.L. 2011-192, sec. 3.(e). Thus, defendants being prosecuted for substantive felonies committed prior to December 1, 2011 and inmates already serving sentences imposed under the habitual felon law are not entitled to relief on account of the revised law.

16. What is the effective date for ASR?

The ASR law applies to qualifying defendants who enter a plea or are found guilty on or after January 1, 2012.

17. How do you calculate the ASR date?

The ASR date flows from the defendant's regular minimum sentence. It is determined differently depending on whether that regular sentence is (a) from the presumptive or aggravated range or (b) from the mitigated range.

If the defendant's regular sentence is from the presumptive or aggravated range, no calculation is necessary: the ASR date is simply the shortest mitigated minimum sentence the defendant could have received based on his or her conviction offense and prior record level.

If the defendant's regular sentence is from the mitigated range, the ASR date is 80 percent of the minimum sentence imposed.

18. Can ASR be ordered over the objection of the prosecutor?

No. G.S. 15A-1340.18(c).

19. Can ASR be ordered in the first instance upon revocation of probation?

The law appears to limit ASR eligibility to defendants for whom the court imposes an active sentence at the outset; defendants sentenced to probation but later revoked apparently are ineligible to be ordered into the program by the revoking judge. G.S. 15A-1340.18(c).

20. How does ASR work for defendants with multiple sentences?

The ASR law itself does not address how an ASR sentence should be administered for a defendant subject to multiple judgments. For instance, a defendant convicted of two crimes might be ordered into the ASR program in one or both of the sentences. If the defendant is ordered into ASR in both sentences and they are run consecutively, the prison system will likely sum the ASR dates to determine the earliest possible point of release. For example, a defendant who receives two 8–19 month sentences with ASR dates of 6 months for each would have an aggregate ASR date of 12 months and would apparently be eligible for release onto PRS at that point if the defendant had completed the assigned risk reduction incentives.

Less clear is how the prison system will administer an ASR sentence run consecutively to a non-ASR sentence. In general, the single-sentence rule of G.S. 15A-1354 directs DAC to aggregate the minimum and maximum sentences of all the judgments in a consecutive string and then release the person when he or she has served the aggregate maximum, less earned time, and less a number of months equal to the PRS period that the person will serve. That approach will not work for an ASR sentence, however, because the release date is dictated by the inmate's service of the ASR term instead of by reference to the maximum sentence. Waiting to release the defendant until he or she is, for example, 9 months from the aggregate maximum sentence would negate the effect of the ASR date.

21. Does ASR apply to drug trafficking cases?

Probably not. The ASR law does not explicitly exclude drug trafficking offenses from its coverage, but how the law would apply to those offenses as a practical matter is unclear. The ASR date is determined

based on the "shortest mitigated sentence for the offense at the offender's prior record level." Neither of those determining factors makes sense as applied to drug trafficking: there are no mitigated sentences for drug trafficking under G.S. 90-95(h), and drug trafficking sentences do not take prior record level into account.

22. Can a defendant get ASR for an offense which, because of its offense date, is not eligible for post-release supervision?

Yes. DAC is honoring ASR dates for eligible Class F–H felons with offense dates before December 1, 2011, even though those offenders are not subject to post-release supervision upon release. This issue is addressed in greater detail in this blog post.

PROBATION SENTENCING

23. After the JRA, what is the difference between a community punishment and an intermediate punishment?

The new definitions of community punishment and intermediate punishment give the court more flexibility to shape a defendant's supervision. For example, never is the court required under the new law to impose any particular conditions to make a sentence intermediate, and fewer conditions are off limits at the outset in community cases.

That flexibility could, however, raise issues in the interpretation of judgments. Only sentences that initially include special probation or assignment to a drug treatment court will be unambiguously intermediate. Given the possible ambiguity, judges and clerks should be sure to check the box in the upper right-hand corner of the suspended sentence judgment forms indicating whether the sentence is a community or intermediate punishment.

There are several reasons why the distinction matters. First, whether a sentence is a community punishment or an intermediate punishment dictates how long the period of probation can be (without findings that a longer or shorter period is required) under G.S. 15A-1343.2(d).

Second, under G.S. 15A-1343(b4), four additional conditions of probation apply to any defendant subject to intermediate punishment (perform community service if required; not use, possess, or control alcohol; remain within the county; and participate in any evaluation, counseling, treatment, or educational program as directed by the probation officer).

Third, whether the sentence is community or intermediate punishment bears on what conditions a probation officer can add through delegated authority under G.S. 15A-1343.2.

24. Can the court still order a split sentence after JRA?

Yes. The JRA did not repeal the court's authority to impose a split sentence, either at sentencing or as a modification of probation, as addressed in this blog post on confinement options other than CRV.

25. Do all curfews have to be monitored electronically after JRA?

Any curfew ordered by a probation officer through delegated authority must include electronic monitoring. G.S. 15A-1343.2(e) and (f). That is true regardless of the probationer's offense date. A judge may order a curfew either with or without monitoring in his or her discretion. This issue is addressed in greater detail in this blog post about curfews and electronic monitoring of probationers.

26. Can the court impose short-term ("dip") confinement at sentencing as part of a "community" punishment?

Probably. "Dip" confinement is listed among the new "community and intermediate conditions of probation" set out in G.S. 15A-1343(a1). That law says that any of those conditions may be imposed as part of a community or intermediate punishment.

PROBATION VIOLATIONS AND DELEGATED AUTHORITY

27. Can the court delegate some aspect of delegated authority but not others? (For example, can the court delegate authority to impose all conditions except quick dips?)

The statute does not say, but it seems reasonable to assume that the court may delegate some aspects of delegated authority and not others.

28. Can a probation officer impose a quick dip for a violation of a condition that was previously added by the officer through delegated authority?

No, quick dips may only be imposed in response to violations of court-imposed conditions. G.S. 15A-1343.2(e) and (f).

29. Can violations responded to by a probation officer with a quick dip later be brought before the court for additional response?

Under Community Corrections policy, "[o]nce noncompliance has been addressed through the delegated authority process, it cannot be included on any future violation report." § E.0205(b).

30. Are quick dips constitutional?

There is no clear answer from North Carolina's appellate courts. The issue is discussed in detail in this blog post.

31. Does delegated authority apply in deferred prosecution and G.S. 90-96 cases?

Probably not. Because an offender must, under G.S. 15A-1343.2(e) and (f), be sentenced to a community or intermediate punishment for delegated authority to apply, it is questionable whether a probation officer may exercise delegated authority in deferred prosecution or G.S. 90-96 cases. In those cases, the defendant has not yet been sentenced and thus has not yet received a community or intermediate punishment—a classification necessary for determining which delegated authority conditions would be permissible under G.S. 15A-1343.2(e) (community) or (f) (intermediate).

32. Do probation officers and judges draw from the same pool of days for purposes of imposing quick dips?

There is no express statutory connection between a judge's authority to impose short-term probation as a community and intermediate probation condition and a probation officer's authority to do so through delegated authority. Community Corrections is assuming as a matter of training and policy that the time is shared, and that any days imposed by the judge are then unavailable to the officer.

33. What is the effective date of the limit on the court's authority to revoke probation?

The JRA's limitation on judges' revocation authority was made effective for probation violations occurring on or after December 1, 2011. The phrase "probation violations occurring" in the effective date clause almost certainly refers to the alleged offending behavior itself—not to the date the violation report was filed, the date of the violation hearing, or any other triggering event. It is possible in the short term that a single violation report will include a mix of pre– and post–December 1, 2011 violations. A judge will need to know the date of each alleged violation to determine the permissible response options. Prior law—allowing revocation for any violation, but not authorizing Confinement in Response to Violation (CRV)—applies to any violations that happened before December 1, 2011.

34. Do the JRA's limits on revocation authority apply to DWI cases?

Yes. The limits on revocation authority were set out in G.S. 15A-1344, a statutory section that applies to both Structured Sentencing and DWI probationers. G.S. 15A-1341(a).

35. Do the JRA's limits on revocation authority apply to unsupervised cases?

Yes. In general, except where the statutes say otherwise, an unsupervised probationer is subject to the same rules as a supervised probationer. G.S. 15A-1341(b). The limit on a judge's authority to revoke is set out in G.S. 15A-1344(a), which is not restricted to supervised probationers. There is some argument that the reference in G.S. 15A-1344(d2) to defendants "under supervision" for felonies or misdemeanors was meant to limit the confinement in response to violation law to supervised probationers. But that reading is hard to square with G.S. 15A-1344(a), and it would be counterintuitive for the JRA to allow revocation for unsupervised probationers and not allow it for supervised probationers.

36. Can a probationer still be revoked for a violation of intensive supervision?

Yes, if he or she is properly subject to intensive supervision to begin with. The JRA's repeal of intensive supervision was effective for offenses committed on or after December 1, 2011. Thus, intensive supervision may still be proper—and enforceable—for probationers with earlier offense dates.

37. Which probation absconders can be revoked? What is the "donut hole" in the absconding law?

Only probationers on probation for offenses committed on or after December 1, 2011, and probationers who actually absconded before December 1, 2011 may be revoked for absconding. This issue is addressed in this blog post on the "donut hole" in the absconding law.

38. Can a pending charge be a "new criminal offense" for purposes of probation revocation?

Probably. In general, a person's probation should not be revoked based on a new criminal offense until he or she is convicted of that charge, State v. Guffey, 253 N.C. 43 (1960), unless the probation court makes an independent finding, to its "reasonable satisfaction," that the defendant committed a crime. State v. Monroe, 83 N.C. App. 143 (1986). Probation should never be revoked based on the mere fact that a new criminal charge is pending; rather, there must be a conviction or some inquiry by the probation court into the alleged criminal behavior itself. This issue is addressed in this blog post on new criminal charges as a violation of probation.

39. After the JRA, is it still the case that a person cannot be revoked solely for conviction of a Class 3 misdemeanor?

Yes. The JRA did not repeal the rule that a person may not be revoked solely for conviction of a Class 3 misdemeanor. G.S. 15A-1344(d). That rule thus stands as an exception to the general rule that probation may revoked for a new criminal offense.

40. Can technical violations be framed as a new criminal offense to allow for revocation?

In some circumstances that may be permissible. For example, a probationer with a positive drug screen might be said to have committed the criminal offense of possession of a controlled substance, or a probationer who fails to appear for a violation hearing might be said to have committed the crime of failure to appear under G.S. 15A-543. That said, any independent finding of a new criminal offense must be a finding of behavior that clearly constitutes a crime. For instance, a positive drug screen may not, without more, constitute evidence sufficient to prove that a defendant committed the crime of knowingly and intentionally possessing a controlled substance. State v. Harris, 361 N.C. 400 (2007).

41. Can a sex offender's probation be revoked on his or her first technical violation?

No. Sex offender probationers are subject to the same limits on revocation authority as non–sex offenders. Only sex offender *post-release supervisees* may be revoked on their first technical violation of PRS. G.S. 15A-1368.3(c)(1).

CONFINEMENT IN RESPONSE TO VIOLATION

42. Can the court order CRV to be served on weekends?

Probably not. There is no statutory provision allowing or prohibiting CRV to be served in noncontinuous periods (on weekends, for example). In the absence of such a provision, however, CRV periods should probably be served continuously. *See* State v. Miller, 205 N.C. App. 291 (2009) (holding that, absent statutory authorization, a judge lacks authority to allow a defendant to serve an active sentence on weekends in a Structured Sentencing case).

43. Can the court impose CRV for a new criminal offense or absconding?

No. Under G.S. 15A-1344(d2), CRV is only for violations other than new criminal offenses and absconding.

44. Must an offender be "dipped" (i.e., ordered to a 2-3 day confinement period) before he or she may be "dunked" (i.e., ordered to serve a CRV period)?

No. There is no statute or policy saying a person must be dipped before he or she may be dunked.

45. Can CRV periods be run consecutively?

No, CRV periods must be served concurrently, regardless of whether the underlying suspended sentences are set to run consecutively in the event of revocation. G.S. 15A-1344(d2).

46. Can the court order a split sentence consecutive to a CRV period (or vice-versa)?

The law is silent as to whether CRV periods may be run consecutively to other probation sanctions, such as a term of special probation, a period of contempt confinement, or active sentences (perhaps for a shorter misdemeanor, for instance) ordered in response to some other violation. A judge wishing to do that would presumably specify on the modification order ordering the CRV period that it is to begin at a future date to coincide with the completion of the first sanction or sentence (or, conversely, that the other sanction is to begin at the conclusion of the CRV).

47. Can a court order a CRV period of less than 90 days for a felony?

Only if the defendant has 90 days or less remaining on his or her suspended sentence. G.S. 15A-1344(d2). Otherwise, the CRV period must be 90 days exactly.

48. Can a CRV period exceed a defendant's suspended sentence?

No. Because a defendant gets jail credit for CRV, the CRV period may be no longer than his or her suspended sentence. For example, the longest permissible CRV period for a misdemeanant with a 45-day suspended sentence is 45 days, even though G.S. 15A-1344(d2) says the CRV period for a misdemeanor may be "up to 90 days."

49. Is the court ever required to impose CRV?

No, the court is never required to impose CRV. Judges can still respond to technical violations using any type of modification or by doing nothing at all.

50. Can the court order a third CRV period in response to a third technical violation?

No. Under G.S. 15A-1344(d2), a defendant "may receive only two periods of confinement under this subsection." After two CRV periods, the court would either need to revoke probation or respond to the violation in some other way.

51. Can an offender's suspended sentence be reduced when a CRV period is imposed?

Unclear. Under G.S. 15A-1344(d) and (d1), a court can, "before activating a sentence," reduce a defendant's sentence within the same sentencing grid cell. Those provisions clearly allow the court to reduce a defendant's sentence when revoking his or her probation. It is uncertain whether they also allow the court to reduce a person's suspended sentence when imposing CRV. A case decided before the JRA indicated that a judge may reduce a sentence only when probation is activated. State v. Mills, 86 N.C. App. 479 (1987). Nevertheless, to the extent that CRV can be styled as a partial activation, the reduction may be permissible. If it is, any suspended sentence for a misdemeanor may be sufficiently reduced to the point that a terminal CRV is permissible.

52. Can a CRV period ever extend beyond a person's period of probation?

Yes—at least as the law is being interpreted by DAC. Under the current DAC interpretation, a person ordered on the next-to-last day of his or her probation period to serve a 90-day CRV period would not be released from prison after 1 day. Rather, he or she would serve the full 90 days and then be released outright.

53. Where is CRV served?

CRV is served where the defendant would have served an active sentence. G.S. 15A-1344(d2). The simplest reading of that rule is that any CRV period ordered in a case should be served in the place of confinement ordered on the original judgment suspending sentence. Under that approach, in cases with sentences initially imposed on or after January 1, 2012, the proper place of confinement for a felony CRV period is DAC, which has identified six facilities that will house CRV inmates (Dan River, Greene, Odom, Tyrrell, Western Youth Institution and, for women, Fountain Correctional).

54. Does a probationer earn any sentence reduction credits during CRV?

No. The Secretary of Public Safety is empowered to issue regulations allowing for the award of earned time credit for Structured Sentencing sentences and good time credit for impaired driving sentences. The secretary has not issued rules regarding such reductions during CRV confinement periods, meaning each day of the imposed term must be served.

55. How much jail credit does a probationer get for concurrent CRV periods in multiple cases when those cases are later revoked and the sentences are run consecutively?

It appears that the person gets credit against each suspended sentence in which a CRV was served, regardless of whether those sentences are run consecutively. For example, a person on probation for two offenses who serves concurrent 90-day CRVs for each case would get 180 total days of jail credit if probation were revoked and the sentences were activated and run consecutively. That is a departure from G.S. 15-196.2, which says that time spent in pretrial confinement for more than one pending charge is only applied once if those charges result in consecutive sentences.

56. Can a defendant appeal a period of CRV?

Unclear. The JRA did not include an explicit statutory provision for appealing a CRV period—either from district to superior court for a de novo violation hearing or from superior court to the appellate division for review. Under G.S. 15A-1347 and existing case law, there is no provision for appeal of probation matters other than revocation or imposition of special probation. *See* State v. Edgerson, 164 N.C. App. 712 (2004) ("Defendant's sentence was neither activated nor was it modified to 'special probation.' Defendant therefore has no right to appeal."). Strictly speaking, CRV is neither a revocation nor special probation. And because the right to appeal in North Carolina is purely statutory, there is a sense that CRV may not be appealed.

There may, however, be an argument that imposition of a CRV period—especially a terminal CRV period—fits within the language of G.S. 15A-1347 as an activation or partial activation, although other provisions in that law reference "judgments revoking probation." Even if that statute is not applicable, other avenues for review may be possible. For appeals from superior court to the appellate division, G.S. 15A-1442(6) (providing that a defendant may appeal other prejudicial errors of law) or G.S. 7A-27(b) (granting jurisdiction to the court of appeals to review any final judgment of a superior court) may be deemed a sufficient basis for appeal. Aside from those provisions, a defendant might also seek review through a petition for a writ of certiorari, motion for appropriate relief, petition for a writ of habeas corpus, or other extraordinary writ, depending on the nature of the alleged error.

57. Can credit other than prehearing credit be applied to CRV?

Statutorily, the only jail credit that must be applied to CRV is any time spent in detention awaiting the hearing at which the CRV was imposed. There is no statutory authorization for or prohibition against the award of other credit, such as pretrial confinement.

G.S. 90-96

58. Must G.S. 90-96 probationers be placed on supervised probation?

No, the statute does not require supervised probation.

59. Can a person be placed on G.S. 90-96 for multiple convictions at the same session of court?

Conditional discharge appears to be mandatory even when an eligible defendant is convicted of multiple simple possession offenses at once. If the convictions arise at the same time, none is a disqualifier for the others, and the court would appear to be required to defer proceedings and place the defendant on G.S. 90-96 probation for all of them (assuming the defendant consents).

60. Where should violations of G.S. 90-96 probation be heard?

A violation hearing in a G.S. 90-96 case probably may be held in any of the locations appropriate for a regular probation case (the district of origin, the district where the offender resides, or where the alleged violation occurred). *See* G.S. 15A-1344(a). As a practical matter, however, it will often make sense to return the case to the district of origin, because that is the court empowered to enter judgment and to sentence the defendant in case of revocation.

61. Can a probation officer arrest a probationer for a violation of G.S. 90-96 probation?

Yes. A probation officer appears to have the same arrest authority in a G.S. 90-96 case as he or she has in a regular probation case, as discussed in this blog post on probation officers' arrest authority in deferral cases.

PLACE OF CONFINEMENT

62. What is the effect of consecutive misdemeanor sentences when determining a defendant's proper place of confinement?

When a defendant is subject to multiple judgments, whether the court should determine the proper place of confinement by considering each sentence in isolation or considering the effect of any consecutive sentences is unclear. The statutory subsection describing which defendants should be sentenced to the Statewide Misdemeanant Confinement Program, G.S. 15A-1352(e), refers to "a misdemeanor" and "a sentence" in the singular, whereas subsection (a) says that a defendant should be committed to DAC if the "sentence or sentences" imposed require confinement of more than 180 days. An interpretation that takes both of those provisions into account is that consecutive sentences should not be aggregated when determining whether the defendant meets the 91-day floor for the SMCP but should be aggregated when determining whether sentences exceed the program's 180-day ceiling.

63. Can a felony split sentence be served in the local jail?

Yes. The JRA did not change the place-of-confinement rule for split sentences. Under G.S. 15A-1351(a), a judge can, in his or her discretion, order a split sentence to be served in DAC or a designated local confinement facility or treatment facility. Noncontinuous periods of confinement (for example, "weekender" confinement) must be served in a local confinement facility or treatment facility; the judge may not order that noncontinuous periods be served in prison.

64. Can a probation officer impose jail fees for quick dip days?

No. There is no authority for a probation officer to impose jail fees for a quick dip.

65. Can the court impose a jail fee for CRV?

Probably not. A judge may, under G.S. 7A-313, order a $40 per day jail fee for time spent in the jail "pursuant to a probationary sentence." That authority applies to special probation confinement (a split sentence) and probably also to dip confinement imposed by a judge as a community and intermediate condition of probation. The fee probably may not, however, be ordered for a CRV period served in a jail. CRV is not a condition of probation like special probation or a dip. It is, rather, more akin to a partial activation of a suspended sentence, and a defendant is never required to pay a jail fee for time spent in jail pursuant to an active sentence.