A selection of North Carolina appellate cases applying the Structured Sentencing Act.
Practitioners should read each case in full before citing it as authority.
Includes published decisions through January 15, 2013.

Part I. Structured Sentencing for Felonies

Section I: Imposing Sentences for Felonies

Step 1: Determine the Offense Class for Each Felony Conviction.

A. Felony Offense Classes

Date of offense

***State v. Lawrence*, 193 N.C. App. 220, 667 S.E.2d 262 (2008).** Defendant was convicted of first degree sexual offense and received a sentence of life imprisonment under the Fair Sentencing Act. On appeal, he claimed that he should have been sentenced to a term of months under Structured Sentencing, absent sufficient evidence that his crime occurred prior to the effective date of the Structured Sentencing Act on October 1, 1994. The Court of Appeals agreed. Offenses committed prior to October 1, 1994, are sentenced under Fair Sentencing; offenses committed between October 1, 1994, and December 1, 1995, are sentenced under the original version of Structured Sentencing (*see* 1993 N.C. Sess. Laws ch. 538, sec. 1); and offenses committed on or after 1 December 1995 are sentenced under the amended version of Structured Sentencing (*see* 1995 N.C. Sess. Laws ch. 507, sec. 19.5). The indictment alleged a date of offense between June 1, 1994, and July 31, 1994. The victim, whose seventh birthday was on October 8, 1994, testified that the incident occurred when she was "around seven" years of age. A detective testified that the victim told him that the incident occurred when she "was seven years old." In seeking a life sentence, the State was obliged to prove that the Fair Sentencing Act applied to defendant's crime. The Court of Appeals found that the witness testimony "support[ed] only a suspicion or conjecture that the crime occurred prior to [October 1,] 1994."

***State v. Poston*, 162 N.C. App. 642, 591 S.E.2d 898 (2004).** Defendant was convicted of two first degree statutory sexual offenses, one of which allegedly occurred in 1994, before the effective date of the Structured Sentencing Act. For that count, the trial court sentenced defendant under the Fair Sentencing Act as a Class B felon, giving him life imprisonment. The Court of Appeals remanded for resentencing, holding that the State failed to prove that the offense occurred before the effective date of Structured Sentencing. Because Structured Sentencing would sentence defendant to a term of months (rather than life) as a Class B1 felon, the doubt should be resolved against the harsher sentence.

***State v. Mullaney*, 129 N.C. App. 506, 500 S.E.2d 112 (1998).** The trial court sentenced defendant under the Fair Sentencing Act for a conviction of embezzlement. The offense occurred over several dates, spanning a period of time from prior to the enactment of Structured Sentencing to after its effective date. A divided panel of the Court of Appeals held that, because the State chose to charge one offense instead of separate offenses for each transaction, and the indictment alleged that the offense was not concluded until after October 1, 1994, defendant

must be sentenced under the Structured Sentencing Act.

B. Conspiracy to Commit a Felony

C. Attempt to Commit a Felony

D. Solicitation to Commit a Felony

E. Accessory After the Fact

F. Felony Offense Class Enhancements

Criminal behavior prohibited by a valid protective order *G.S. 50B-4.1(d)*

***State v. Byrd*, 363 N.C. 214, 675 S.E.2d 323 (2009).** Defendant received an enhanced sentence for assault with a deadly weapon with intent to kill inflicting serious injury, based on his knowing violation of a valid domestic violence protective order (DVPO). He assaulted his wife after she filed a complaint for divorce from bed and board and obtained a temporary restraining order (TRO) against him pursuant to N.C.R. Civ. P. 65. Reversing a divided panel of the Court of Appeals in *State v. Byrd*, 185 N.C. App. 597, 649 S.E.2d 444 (2007), the Supreme Court noted that "[o]nly a valid protective order entered under Chapter 50B can be used to enhance a defendant's sentence under [G.S.] 50B-4.1(d)." Although the victim could have moved for a DVPO under Chapter 50B, she instead sought a TRO under Rule 65. Moreover, because the TRO was entered *ex parte*, "it fail[ed] to meet the second prong of the definition of a valid domestic violence protective order in that it was not entered 'upon hearing by the court or consent of the parties.' [G.S.] 50B-1(c)."

Effective July 24, 2009, the General Assembly amended G.S. 50B-4.1 to add the following subsection (h): "For the purposes of this section, the term "valid protective order" shall include an emergency or *ex parte* order entered under this Chapter." 2009 N.C. Sess. Laws 342, sec. 5.

Step 2: Determine the Prior Record Level for the Offender.

A. Counting Prior Record Points

Prior convictions generally

***State v. Reaves*, 142 N.C. App. 629, 544 S.E. 2d 253 (2001).** A prior finding of criminal contempt does not result in any prior record points.

***State v. Vaughn*, 130 N.C. App. 456, 503 S.E.2d 110 (1998), *aff'd per curiam*, 350 N.C. 88, 511 S.E.2d 638 (1999).** Defendant was convicted of possessing a stolen car. In calculating his prior record level, the court treated his prior breaking and entering conviction for which he was sentenced as an habitual felon as a Class C felony, rather than Class H. The Court of Appeals reversed. "Habitual felon" is a status, not a substantive offense. Therefore, for purposes of G.S. 15A-1340.14, defendant's prior conviction was for the Class H felony of breaking and entering.

***State v. Rich*, 130 N.C. App. 113, 502 S.E.2d 49 (1998).** The court rejected defendant's argument that prior convictions which occurred ten years before the current offense should not be counted in determining prior record level. There is no statute of limitation on the use of prior convictions to determine prior record level.

Classify convictions based on date of the sentencing offense *G.S. 15A-1340.14(c)*

***State v. Watkins*, 195 N.C. App. 215, 672 S.E.2d 43 (2009).** Defendant pled guilty to felonies committed in 2003. In calculating his prior record level, the trial court treated a 1997 conviction for sale of cocaine as a Class G felony, based on its classification at the time of defendant's 2003 offenses. G.S. 15A-1340.14(c). Defendant challenged his prior record level on the ground that sale of cocaine was a Class H felony in 1997. He argued that the reclassification of this conviction under G.S. 15A-1340.14(c) violated the *Ex Post Facto* Clause. The Court of Appeals found no error. Because the classification of the 1997 conviction under G.S. 15A-1340.14(c) affected only defendant's punishment for the 2003 offenses, the statute did not offend *ex post facto* principles.

***State v. Scercy*, 159 N.C. App. 344, 583 S.E.2d 339 (2003).** In sentencing defendant for a rape, the court assigned him one prior record point for a financial card fraud conviction. At the time of the rape, financial card fraud was a Class 2 misdemeanor. Under G.S. 15A-1340.14(b), Class 2 misdemeanors result in no prior record points. The Court of Appeals remanded for resentencing. Under G.S. 15A-1340.14(c), the classification of an offense for prior record purposes is the classification at the time of the sentencing offense, not at the time of sentencing.

***State v. Rice*, 129 N.C. App. 715, 501 S.E.2d 665 (1998).** In calculating defendant's prior record level, the trial court treated a 1972 common law kidnapping conviction as second-degree kidnapping. Defendant appealed, arguing that common law kidnapping had been abolished and was classified as a misdemeanor while in effect. The Court of Appeals found no error. Noting that the intent of the Structured Sentencing Act was to provide more severe punishment for recidivists, the Court held it would be contrary to legislative intent to exclude the prior conviction. In determining how to count the prior offense, the Court relied on G.S. 15A-1340.14, which requires that a prior offense be classified based on the current classification of the offense at the time of sentencing. If no such offense exists, the sentencing court must find a substantially similar crime for which classification may be assigned. The Court of Appeals found that the trial court properly determined that defendant's common law kidnapping conviction most closely resembled second-degree kidnapping.

All elements of present offense are included in any prior conviction *G.S. 15A-1340.14(b)(6)*

***State v. Ford*, 195 N.C. App. 321, 672 S.E.2d 689 (2009).** Defendant was convicted of attempted larceny of property valued at more than $1,000.00, a felony under G.S. 14-72(a), and

then pled guilty to habitual felon status. Citing *State v. Bethea*, 122 N.C. App. 623, 471 S.E.2d 430 (1996), the Court of Appeals held the trial court did not violate G.S. 14-7.6 by assigning defendant a prior record point under G.S. 15A-1340.14(b)(6), based on a prior conviction for felony larceny which was also alleged in the habitual felon indictment. The court further found that all of the elements of attempted felony larceny were included in defendant's prior conviction for felony larceny, inasmuch as "it is settled that attempted felony larceny is a lesser-included offense of felony larceny." For purposes of G.S. 15A-1340.14(b)(6), it was immaterial that defendant's prior felony larceny convictions were not based on the value of the property being in excess of $1,000. Larceny is a common law crime in North Carolina. The various provisions of G.S. 14-72 speak only to punishment; they do not change essential elements of the crime.

***State v. Poore*, 172 N.C. App. 839, 616 S.E.2d 639 (2005).** Defendant appealed the trial court's assignment of a prior record point for all elements of the current offense being included in a prior conviction, G.S. 15A-1340.14(b)(6), arguing that the point was an issue of fact that must be determined by a jury or admitted by defendant, in accordance with *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004). The Court held that the same elements point is "akin to the trial court's determination that defendant had in fact been convicted of certain prior offenses" and, therefore, may be found by the court rather than the jury.

Offense committed while on probation, parole, etc. *G.S. 15A-1340.14(b)(7)*

***State v. Wissink*, 187 N.C. App. 185, 652 S.E.2d 17 (2007).** The sentencing court found that defendant committed his offense while on probation and assigned him a prior record point pursuant to G.S. 15A-1340.14(b)(7). In *State v. Wissink*, 172 N.C. App. 829, 617 S.E.2d 319 (2005), the Court of Appeals held that the assessment of this prior record point violated the holding in *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004), inasmuch as "a fact other than a prior conviction, defendant's probationary status, that increased defendant's sentence was not submitted to a jury and proved beyond a reasonable doubt." The Supreme Court agreed that a finding under G.S. 15A-1340.14(b)(7) implicates a defendant's Sixth Amendment rights under *Blakely*. *State v. Wissink*, 361 N.C. 418, 645 S.E.2d 761 (2007). However, it remanded to the Court of Appeals to determine whether (1) defendant admitted his status as a probationer, thereby waiving his right to a jury finding under *State v. Hurt*, 361 N.C. 325, 330, 643 S.E.2d 915, 918 (2007), or (2) the trial court's *Blakely* violation was harmless beyond a reasonable doubt under *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006). On remand, the State argued that defendant stipulated to his status as a probationer and, therefore, no *Blakely* violation occurred. Rather than reach this issue, the Court of Appeals found any *Blakely* violation to be harmless beyond a reasonable doubt, given the "overwhelming and uncontroverted evidence that Defendant committed the offense . . . while he was on probation for another offense."

***State v. Tucker*, 154 N.C. App. 653, 573 S.E.2d 197 (2002).** Defendant was in a youth development center (YDC) at the time of his sentencing offenses. The sentencing court found that he committed the offenses while serving a sentence of imprisonment and assigned a prior record point pursuant to G.S. 15A-1340.14(b)(7). The Court of Appeals reversed, holding that a juvenile commitment to a YDC is not a "sentence of imprisonment."

Prior convictions used as element of offense

***State v. Best*, __ N.C. App. __, 713 S.E.2d 556 (2011).** In sentencing defendant for possession of a firearm by a felon, the trial court assigned prior record points for his prior conviction for breaking and entering, which was also used to establish defendant's status as a convicted felon for the firearm offense. The Court of Appeals found no error. Citing *State v. Goodwin*, 190 N.C. App. 570, 661 S.E.2d 46 (2008), the Court contrasted the offense of possession of a firearm by a felon from the recidivist offense of habitual impaired driving addressed in *State v. Gentry*, 135 N.C. App. 107, 519 S.E.2d 68 (1999): "[G]iven that the mere possession of a firearm, unlike driving while impaired, is not a criminal offense, the sort of "double-counting" condemned in *Gentry* . . . simply does not occur when the same conviction is utilized to . . . establish the defendant's guilt of the underlying offense and to calculate his prior record level . . . for that offense."

***State v. Goodwin*, 190 N.C. App. 570, 661 S.E.2d 46 (2008).** The trial court assigned defendant prior record points for his convictions for felony manufacture of marijuana and possession of a firearm by a felon. The marijuana offense had been used to establish defendant's status as a convicted felon for purposes of the firearm offense. The Court of Appeals held that both convictions were properly included in defendant's prior record level calculus. Distinguishing *State v. Gentry*, 135 N.C. App. 107, 519 S.E.2d 68 (1999), the Court explained that "[p]ossession of a firearm by a felon is a separate substantive offense from the defendant's prior felony upon which his status as a felon was based."

***State v. Bauberger*, 176 N.C. App. 465, 626 S.E.2d 700, *aff'd per curiam without precedential value*, 361 N.C. 105, 637 S.E.2d 536 (2006).** Defendant was convicted of second-degree murder for a fatal traffic accident resulting from his driving while impaired (DWI) and was sentenced as a Prior Record Level II. On appeal, he argued that the use of a prior DWI for prior record points violated G.S. 15A-1340.16, because the DWI was also used to prove the malice element of second-degree murder. The Court of Appeals noted that G.S. 15A-1340.16 bars the use of evidence necessary to prove an element of the offense to prove any aggravating factor, but held that "defendant's prior convictions were not aggravating factors." The Court contrasted G.S. 14-7.6, which explicitly bars the prior felony convictions alleged in the habitual felon indictment from being used to calculate the habitual felon's prior record level.

***State v. Hyden*, 175 N.C. App. 576, 625 S.E.2d 125 (2006).** Defendant pled guilty plea to involuntary manslaughter, reckless driving, and related offenses. In calculating his prior record level, the trial court used his two prior convictions for habitual impaired driving and three prior convictions for misdemeanor driving while impaired (DWI), even though these DWI convictions had been used as elements of the habitual impaired driving offenses. The Court of Appeals found no error. Habitual impaired driving is a substantive offense, unlike habitual felon status. Accordingly, "[d]efendant's prior record included five instances of DWI, three of which were punished as misdemeanors and two of which were punished as felonies."

***State v. Harrison*, 165 N.C. App. 332, 598 S.E.2d 261 (2004).** Defendant was convicted of failure to register as a sex offender under G.S. 14-208.11. The trial court assigned him prior record points for the second-degree rape conviction that resulted in his status as a sex offender. On appeal, defendant claimed the rape conviction was an element of his current offense and, therefore, could not be used in his prior record level calculation. The Court of Appeals affirmed, holding that failure to register as a sex offender is a separate crime, and that the underlying sex

offense is not an element thereof.

***State v. Gentry*, 135 N.C. App. 107, 519 S.E.2d 68 (1999).** The three prior convictions for driving while impaired which were used to support defendant's current conviction for habitual impaired driving may not also be used to calculate her prior record level for this offense.

Exclude prior convictions used to establish defendant's habitual felon status *G.S. 14-7.6*

***State v. McCrae*, 124 N.C. App. 664, 478 S.E.2d 210 (1996).** The sentencing court assigned prior record points for a conviction that was consolidated for judgment with a conviction used to establish defendant's habitual felon status. The Court of Appeals found no error. Where prior offenses have been consolidated for judgment, one may be used to establish habitual felon status, while the other may be used for the prior record level.

***State v. Bethea*, 122 N.C. App. 623, 471 S.E.2d 430 (1996).** The trial court assigned defendant one prior record point under G.S. 15A-1340.14(b)(6), because all the elements of the sentencing offense were included in a prior conviction. A second point was assigned under G.S. 15A-1340.14(b)(7), because defendant was on probation at the time of the sentencing offense. Both of these underlying prior convictions had been used to establish defendant's habitual felon status. The Court of Appeals found no error, reasoning that G.S. 15A-1340.14(b)(6) and (7) address the nature and timing of the sentencing offense, rather than the mere existence of prior convictions. Therefore, the prohibition in G.S. 14-7.6 against double-counting a conviction for both habitual felon status and prior record level purposes was not violated.

Harmless error *G.S. 15A-1443(a)*

***State v. Lindsay*, 185 N.C. App. 314, 647 S.E.2d 473 (2007).** Any error in computing a defendant's prior record points is harmless if it does not affect the prior record level.

***State v. Fraley*, 182 N.C. App. 683, 643 S.E.2d 39 (2007).** On appeal, defendant argued that his prior record level improperly included two convictions from the same week of court, *see* G.S. 15A-1340.14(d). The State claimed that the error was harmless, inasmuch as the trial court could have assigned an additional point under G.S. 15A-1340.14(b)(6), because all the elements of the sentencing offense were included in one of defendant's prior convictions. The Court of Appeals remanded for resentencing. It declined to assign defendant a prior record point under G.S. 15A-1340.14(b)(6), deeming it "not within our province . . . to make findings or to substitute our judgment for that of the sentencing court."

B. Calculating the Prior Record Level

Stipulating to prior record level

***State v. Fair*, 205 N.C. App. 315, 695 S.E.2d 514 (2010).** Defendant stipulated to having a Prior Record Level IV based on nine points, as reflected on his sentencing worksheet. He then appealed his prior record level calculation. The Court of Appeals remanded for resentencing, because defendant's worksheet erroneously assigned prior record points for each of two convictions obtained on the same day of court, in violation of G.S. 15A-1340.14(d). The Court noted that, "[u]nlike a stipulation to the existence of a prior conviction, which is binding on appeal, the trial court's determination as to whether a conviction may be counted for felony sentencing

purposes is reviewable on appeal."

***State v. Fraley*, 182 N.C. App. 683, 643 S.E.2d 39 (2007).** Defendant was sentenced based on his stipulation to a Prior Record Level (PRL) IV. On appeal, he argued that his PRL improperly included two convictions from the same week of court, *see* G.S. 15A-1340.14(d). The Court of Appeals remanded for resentencing. A stipulation may prove the existence of prior convictions; but a stipulation to a PRL is invalid insofar as it involves an erroneous conclusion of law.

***State v. Flint*, 199 N.C. App. 709, 682 S.E.2d 443 (2009).** Defendant stipulated to having a Prior Record Level VI, and was so sentenced. On appeal, he argued that his prior convictions did not support the point total reflected on his sentencing worksheet. The State responded that defendant was bound by his stipulation. The Court of Appeals held that, "[a]lthough defendant's stipulation as to prior record level is sufficient evidence for sentencing at that level . . ., the trial court's assignment of level VI to defendant was an improper conclusion of law, which we review *de novo*." Because defendant's prior convictions yielded a point total corresponding to a Prior Record Level V, he was entitled to resentencing.

C. Definition of Prior Conviction

Meaning of "Prior" *G.S. 15A-1340.11(7)*

***State v. Pritchard*, 186 N.C. App. 128, 649 S.E.2d 917 (2007).** In calculating a defendant's prior record level at re-sentencing, the court should take into account any convictions obtained since the original sentencing proceeding but prior to the entry of judgment at resentencing.

***State v. West*, 180 N.C. App. 664, 638 S.E.2d 508 (2006).** Defendant was convicted of second-degree murder, two counts of felony larceny, and one count of breaking and entering a motor vehicle. After sentencing defendant for the larcenies and breaking and entering, the trial court recessed the proceedings for lunch. "Upon reconvening, the trial court assigned defendant two prior record points for one of the Class H larcenies and proceeded to sentence defendant for second[-]degree murder as a [Prior Record] Level II offender." While noting Structured Sentencing's silence on the issue, the Court of Appeals held that offenses joined for trial with the sentencing offense may not be used in calculating a defendant's prior record level. The Court remanded for resentencing on the murder conviction.

Meaning of "Conviction" *G.S. 15A-1340.11(7)*

***State v. Bidgood*, 144 N.C. App. 267, 550 S.E.2d 198 (2001).** Defendant was sentenced as a Prior Record Level V. One of his prior convictions was later overturned on appeal. Without this conviction, defendant would have had a Prior Record Level IV. The Court of Appeals held that he was entitled to resentencing. Although G.S. 15A-1340.11(7) states that a prior conviction exists when defendant has been convicted of a crime in superior court, regardless of whether the conviction is on appeal, the Court concluded that it would be unjust (and contrary to legislative intent) to deny defendant resentencing under these circumstances.

***State v. Hatcher*, 136 N.C. App. 524, 524 S.E.2d 815 (2000).** The trial court assessed prior record points for an offense that defendant pled no contest and for which prayer for judgment was continued. The Court of Appeals affirmed. Citing G.S. 15A-1331(b), the Court held that a person is considered to have been convicted when he has been found guilty or has entered a

plea of guilty or no contest. Formal entry of judgment is not required.

***State v. Hasty*, 133 N.C. App. 563, 516 S.E.2d 428 (1999).** In calculating defendant's prior record level, the trial court counted a prior conviction for which defendant was on probation at the time of the current offense under the provisions of G.S. 90-96(a). Section 90-96(a) allows for the dismissal of a conviction if a defendant completes all the conditions of probation. Defendant argued that his prior Chapter 90 conviction should not count. The Court of Appeals ruled that defendant's prior conviction did count for sentencing purposes. Defendant had pled guilty to the prior offense; and the conviction had not been dismissed, because defendant had not completed the term of probation before committing the new offense.

D. Considering Multiple Prior Convictions

Convictions obtained in one court week *G.S. 15A-1340.14(d)*

***State v. Fuller*, 179 N.C. App. 61, 632 S.E.2d 509 (2006).** If a defendant sustains convictions in district court and superior court on the same day, one district court conviction and one superior court conviction may be used for prior record points.

***State v. Wilkins*, 128 N.C. App. 315, 494 S.E.2d 611 (1998).** Defendant challenged the trial court's assessment of two prior record points for two Class 1 misdemeanor convictions. Defendant was convicted of the offenses in district court on separate days but argued that, after he withdrew his appeal, the cases were remanded and judgment entered on the same day during the same session of court. The Court of Appeals held that, for purposes of calculating a prior record level, if a defendant appeals a district court conviction to superior court and later withdraws the appeal, the conviction is deemed to occur on the original date of conviction in district court.

***State v. Truesdale*, 123 N.C. App. 639, 473 S.E.2d 670 (1996).** In calculating defendant's prior record level, the trial court used a prior conviction that occurred during the same session of court and was consolidated for judgment with a conviction used to establish defendant's habitual felon status. The Court of Appeals affirmed. Even though G.S. 14-7.6 prohibits using the same conviction to establish both habitual felon status and prior record level, and G.S. 15A-1340.14(d) prohibits the use of more than one conviction obtained in a single calendar week to increase defendant's prior record level, nothing in the statutes prohibits a court from using one conviction obtained in a single calendar week of court to establish habitual felon status and using a second conviction obtained during that same week to determine the prior record level. *Accord State v. McCrae*, 124 N.C. App. 664, 478 S.E.2d 210 (1996).

E. Proof of Prior Convictions

Prosecutor's representation is insufficient

***State v. Bartley*, 156 N.C. App. 490, 577 S.E.2d 319 (2003).** Defendant was sentenced based upon the prosecutor's statement that, "in this case the defendant has 11 prior sentencing points, placing him at Prior Record Level [IV]." The Court of Appeals remanded for resentencing. Defendant's prior record was not stipulated to or proven by copies of records. A prosecutor's unsupported statement, though uncontested, does not meet the State's burden of proof.

***State v. Smith*, 155 N.C. App. 500, 573 S.E.2d 618 (2002).** The trial court relied on the sentencing worksheet submitted by the district attorney without further documentation or stipulation by defendant. The Court of Appeals held that the State failed to prove the existence of defendant's prior convictions by a preponderance of the evidence.

Stipulation of the parties *G.S. 15A-1340.14(f)(1)*

***State v. Wingate*, __ N.C. App. __, 713 S.E.2d 188 (2011).** At sentencing, defendant stipulated to prior convictions for sale or delivery of cocaine and conspiracy to sell or deliver cocaine. He further stipulated that these offenses were Class G felonies. Under North Carolina law, sale of cocaine (or conspiracy) is a Class G felony; and delivery of cocaine (or conspiracy) is a Class H felony. On appeal, defendant argued that his stipulation to the classification of his prior convictions was ineffective, because it involved a question of law rather than fact. The Court of Appeals disagreed. In this context, whether defendant's prior convictions were Class G or Class H felonies was an issue of fact properly resolved by stipulation under G.S. 15A-1340.14(f)(1).

***State v. Boyd*, 200 N.C. App. 97, 682 S.E.2d 463 (2009).** Shown a prior record level worksheet at sentencing, the *pro se* defendant asked, "What does that mean?" The trial court explained that the worksheet indicated defendant had "seven prior conviction points for purposes of sentencing, which would mean you would be what is known as a Level 3[.]" Asked if he had anything to say, defendant announced his desire to appeal. The Court of Appeals remanded for resentencing, finding that defendant's remarks did not amount to a stipulation under G.S. 15A-1340.14(f)(1).

***State v. Hussey*, 194 N.C. App. 516, 669 S.E.2d 864 (2008).** Although a prior record level worksheet does not constitute proof of a prior conviction under G.S. 15A-1340.14(f), the Court of Appeals recognized that the worksheet form has been modified to allow the parties to stipulate to the listed convictions. Accordingly, the court held that the stipulation signed by the prosecutor and defense counsel on the prior record level worksheet was sufficient to establish defendant's prior convictions under G.S. 15A-1340.14(f)(1).

***State v. Hurley*, 180 N.C. App. 680, 637 S.E.2d 919 (2007).** In seeking a sentence at "the very top[]of the presumptive range. A [Prior Record] Level [V,]" the prosecutor tendered a sentencing worksheet and stated, "Judge, as you can see from his record how many convictions he has. He's been stealing for a living since 1990." The judge offered to hear from defense counsel and defendant. Counsel requested that defendant be granted work release, "whatever sentence the Court gives him[.]" Defendant declined the opportunity to speak. "While the sentencing worksheet . . . was alone insufficient to establish defendant's prior record level," the Court of Appeals held that "the conduct of defendant's counsel during the course of the sentencing hearing constituted a stipulation [to] defendant's prior convictions" under G.S. 15A-1340.14(f)(1).

***State v. Alexander*, 359 N.C. 824, 616 S.E.2d 914 (2005).** Defendant pled guilty to assault with a deadly weapon with intent to kill inflicting serious injury. His plea agreement provided that "the State will agree that the defendant be sentenced to a minimum of 80 months and a maximum of 105 months." The prosecutor tendered a prior record level worksheet that assigned defendant one prior record point for a misdemeanor conviction, and a Prior Record Level II. Defense counsel stated to the trial court that "until this particular case [defendant] had no felony convictions, as you can see from his worksheet." The agreed-upon sentence fell within the presumptive range for defendant's Class C felony and a Prior Record Level II. Based on all the

circumstances, the Supreme Court held that "defense counsel's statement to the trial court constituted a stipulation of defendant's prior record level pursuant to [G.S.] 15A-1340.14(f)(1)."

***State v. Jeffery*, 167 N.C. App. 575, 605 S.E.2d 672 (2004).** Defendant was sentenced at Prior Record Level III pursuant to a plea agreement with a negotiated sentence. The State submitted no evidence of defendant's prior convictions other than the prior record worksheet. The Court rejected the State's argument that defendant's negotiation of a specific sentence (which fit within the presumptive range for the cell of the Felony Punishment Chart where Prior Record Level III would place him) constituted a stipulation to the contents of the worksheet. The Court noted that in the absence of some colloquy between defendant and the trial court that otherwise supported the contents of the worksheet, the duration of the negotiated sentence was not sufficient to establish defendant's prior record level.

***State v. Eubanks*, 151 N.C. App. 499, 565 S.E.2d 738 (2002).** In calculating defendant's prior record level, the only evidence presented by the State was a prior record level worksheet listing five prior convictions between 1958 and 1999. Defendant's attorney was presented with the worksheet and stated that he had no objections. The Court of Appeals held that although a worksheet prepared and submitted by the State listing a defendant's prior convictions is, alone, insufficient to satisfy the State's burden in establishing proof of prior convictions, the statements made by defense counsel were reasonably construed as a stipulation by defendant that he had been convicted of the charges listed on the worksheet.

***State v. Hamby*, 129 N.C. App. 366, 499 S.E.2d 195 (1998).** Defendant entered a guilty plea under a written plea agreement providing as follows: "Charge is Class E felony and defendant has a record level of II. The defendant will receive a sentence of 29 mo[nths] min. -- 44 mo[nths] max." The Court of Appeals held that, by admitting to a Prior Record Level II and agreeing to the specified sentencing range, "defendant mooted the issues of whether her prior record level was correctly determined . . . and whether the duration of her prison sentence was authorized."

Copy of DCI, DMV, or AOC Records *G.S. 15A-1340.14(f)(3)*

***State v. Claxton*, __ N.C. App. __, __ S.E.2d __ (Jan. 15, 2013).** Despite discrepancies between North Carolina and New York Department of Criminal Information (DCI) records, the Court of Appeals found New York DCI report sufficient to meet the State's burden of proving defendant's out-of-state convictions by a preponderance of the evidence under G.S. 15A-1340.14(f). Quoting *State v. Safrit*, 154 N.C. App. 727, 730, 572 S.E.2d 863, 866 (2002), the court found the inconsistencies in the spelling of defendant's name, as well as his date and place of birth, race, ethnicity, and height to be "'minor clerical errors.'" The court noted that the NC and NY DCI "Records list identical weights, eye colors, hair colors, and FBI numbers." Moreover, "even though the spelling of the names in the two DCI Records var[ies] slightly, they are substantially similar." Finally, "although the NY DCI Record provides five birthdates and birth locations, it lists the birthdate . . . and birth location . . . provided in the NC DCI Record."

***State v. Crockett*, 193 N.C. App. 446, 667 S.E.2d 537 (2008).** The State met its burden of proving defendant's prior conviction under G.S. 15A-1340.14(f) by "introduc[ing] a computerized criminal history from the Department of Criminal Information (DCI report) and a printout from records maintained by the Mecklenburg County Sheriff's Department."

***State v. Rich*, 130 N.C. App. 113, 502 S.E.2d 49 (1998).** The Court of Appeals upheld the trial court's finding that a computer printout from the Division of Criminal Information (DCI) had sufficient identifying information, such as defendant's fingerprint identifier number and FBI number, to be used to establish defendant's prior record.

Any other method found by the court to be reliable *G.S. 15A-1340.14(f)(4)*

***State v. Best*, 202 N.C. App. 753, 690 S.E.2d 58 (2010)**. A printout of the prosecutor's email to defense counsel, containing "a screenshot from the Administrative Office of the Courts ("AOC") computerized criminal record system showing defendant's prior conviction for assault by pointing a gun in Mecklenburg County[,]" was held sufficient to prove the prior conviction under G.S. Stat. § 15A-1340.14(f). The printed email qualified as a "copy" of a "record maintained electronically" by AOC under G.S. 15A-1340.14(f)(3). Moreover, the record's inclusion of defendant's name, date of birth, case number, charged offense, date and location of arrest, and victim's name provided "sufficient identifying information with respect to defendant to give it the indicia of reliability to prove defendant's prior convictions under [G.S.] 15A-1340.14(f)(4)."

***State v. Fortney*, 201 N.C. App. 662, 687 S.E.2d 518 (2010).** A computerized criminal history printout from the FBI's National Crime Information Center ("NCIC") database -- which included the offender's name, date of birth, sex, race, height, weight, eye color, hair color, scars, and tattoos -- was sufficient proof of out-of-state convictions under G.S. 15A-1340.14(f).

F. Burden and Standard of Proof

G. Prior Record from Other Jurisdictions

Proof of out-of state convictions *G.S. 15A-1340.14(e)*

***State v. Bohler*, 198 N.C. App. 631, 681 S.E.2d 801 (2009).** Under G.S. 15A-1340.14(e), a defendant may stipulate to the fact of an out-of-state conviction and to its classification as a felony or misdemeanor in that jurisdiction.

Classified as a felony in the other jurisdiction *G.S. 15A-1340.14(e)*

***State v. Henderson*, 201 N.C. App. 381, 689 S.E.2d 462 (2009).** "[A] defendant's stipulation to an out-of-state felony conviction is sufficient to support treating the felony conviction as a Class I felony" for purposes of G.S. 15A-1340.14(e).

***State v. Huu The Cao*, 175 N.C. App. 434, 626 S.E.2d 301 (2006).** To establish defendant's prior record level, the State submitted a prior record worksheet and computer printouts from "NLETS", "Crime Records Service DPS Austin TX" and the FBI indicating prior convictions in Texas and the federal system. Defendant's sentencing worksheet listed four out-of-state offenses as felonies, for which the trial court assessed prior record points. The Court of Appeals held the computerized records sufficient to prove the prior convictions but remanded for resentencing. Although the FBI record permitted an inference of defendant's status as a convicted felon, none of the printouts established that he had been convicted of four out-of-state felonies.

Classified as a misdemeanor in the other jurisdiction *G.S. 15A-1340(e)*

***State v. Armstrong*, 203 N.C. App. 399, 691 S.E.2d 433 (2010)**. Defendant had three convictions in Alabama for driving under the influence of alcohol. The State adduced certified copies of Ala. Code 32-5A-191, but offered "no evidence that Alabama classifies violations of Ala. Code 32-5A-191 as misdemeanors." The trial court found the offense to be substantially similar to DWI in North Carolina and assigned one prior record point for each conviction, "treat[ing] the offenses as Class A1 or Class 1 misdemeanors." The Court of Appeals found no error. Because DWI is a misdemeanor punishable by up to 24 months' imprisonment under G.S. 20-138.1(d) and 20-179(g), it is a Class 1 misdemeanor. G.S. 14-3(a), 15A-1340.23(a). Likewise, because a violation of Ala. Code 32-5A-191 is punishable by up to one year in prison, the Court concluded that defendant's "convictions were properly classified as misdemeanors[under G.S.] 14-3(a)(1)." The Court further noted that, "[i]ndeed, Alabama does classify DWIs as misdemeanors" under Ala. Code 13A-1-2(9).

Substantially similar to an offense in North Carolina *G.S. 15A-1340.14(e)*

***State v. Claxton*, __ N.C. App. __, __ S.E.2d __ (Jan. 15, 2013).** The Court of Appeals upheld the trial court's determination that the New York offense of Third Degree Drug Sale (N.Y. Penal Law 220.39 (2012) was substantially similar to the Class G felony of Sale of a Schedule I or II Controlled Substance under G.S. 90-95(b)(1). The New York offense proscribed the sale of a "narcotic drug", which was defined by statute as a "substance f[alling] under Schedules I(b), I(c), II(b), or II(c). Because "[t]hese portions of the New York Drug Schedule are almost identical to the North Carolina lists of Schedule I and Schedule II controlled substances[,]" and there was no evidence of the specific substance involved in defendant's New York conviction, the trial court did not err finding substantial similarity under G.S. 15A-1340.14(e).

***State v. Sanders*, __ N.C. App. __, __ S.E.2d __ (Jan. 15, 2013)**. The trial court found that defendant's prior convictions in Tennessee for misdemeanor Theft of Property and Domestic Assault were substantially similar to Class A1 or Class 1 misdemeanors in North Carolina. The court did not identify specific North Carolina offenses that were equivalent to defendant's crimes but compared of the authorized punishments for the Tennessee offenses with the range of punishments in North Carolina for Class A1 and Class 1 misdemeanors. Because "[a] review of the punishments associated with a crime is not the same as a comparison of its elements and does not meet the substantial similarity test[,]" the Court of Appeals remanded for resentencing.

***State v. Rollins*, __ N.C. App. __, 729 S.E.2d 73 (2012)**. Defendant had a prior conviction in Florida for burglary. Concluding that the Florida offense was substantially similar to North Carolina's Class G felony of second-degree burglary, the trial court assigned defendant four prior record points. Finding error, the Court of Appeals noted that North Carolina limits burglary to a breaking and entering of the dwelling house or sleeping apartment of another in the nighttime with intent to commit a felony therein. G.S. 14-51. By contrast, Fla. Stat. 810.02(b)(1) defines burglary as "[e]ntering a dwelling, a structure, or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter[.]" The Court of Appeals concluded that the Florida offense is sufficiently similar to North Carolina's Class H felony of breaking or entering, G.S. 14-54, "because it encompasses any building and does not have to occur in the nighttime." Therefore, it yielded two prior record points, rather than four.

***State v. Fortney*, 201 N.C. App. 662, 687 S.E.2d 518 (Jan. 5, 2010)**. The trial court assigned defendant four prior record points point for a Virginia conviction for possession of a firearm by a felon, and one prior record point for a conviction for "Assault-3rd" in New York. The record included the trial court's "finding of the statute being similar in Virginia and North Carolina" without any further analysis. Undertaking a *de novo* comparison of the Class 6 felony in Va. Code 18.2-308.2(A) and the Class G felony under G.S. 14-415.1, the Court of Appeals held that the trial court properly treated the Virginia offense as substantially similar to a Class G felony pursuant to G.S. 15A-1340.14(e). Because the trial court had made no determination that the New York conviction was substantially similar to a North Carolina offense, the Court of Appeals "remanded for the trial court to make such a determination."

***State v. Henderson*, 201 N.C. App. 381, 689 S.E.2d 462 (2009).** "[A] defendant's stipulation to an out-of-state felony conviction is sufficient to support treating the felony conviction as a Class I felony, but the stipulation alone is not sufficient to support a higher classification for sentencing purposes."

***State v. Bohler*, 198 N.C. App. 631, 681 S.E.2d 801 (2009).** Although a defendant may stipulate to the fact of an out-of-state conviction and its classification as a felony or misdemeanor in that jurisdiction, "the trial court may not accept a stipulation to the effect that a particular out-of-state conviction is substantially similar to a particular North Carolina felony or misdemeanor[.]" Here, the trial court's error in accepting a stipulation that an offense was substantially similar to a Class A1 misdemeanor was harmless, because the resulting prior record point had no effect on defendant's prior record level.

***State v. Hinton*, 196 N.C. App. 750, 675 S.E.2d 672 (2009).** If the State seeks to treat an out-of-state felony conviction as Class I under the default provision in G.S.15A-1340.14(e), there is no requirement to prove substantial similarity. Only when the State attempts to assign a classification higher than Class I must it prove -- by a preponderance of the evidence -- that the out-of-state conviction is substantially similar to a corresponding North Carolina offense.

***State v. Chappelle*, 193 N.C. App. 313, 667 S.E.2d 327 (2008).** Although defendant was bound by his stipulation to the existence of his prior out-of-state convictions, he could not stipulate to the substantial similarity of the out-of-state offenses to North Carolina offenses under G.S. 15A-140.14(e). The trial court erred by relying on defendant's stipulation to substantial similarity, in lieu of reaching an independent conclusion of law on the issue.

***State v. Morgan*, 164 N.C. App. 298, 595 S.E.2d 804 (2004).** Defendant was sentenced at a Prior Record Level IV, based in part upon a prior record which included a 1987 third-degree homicide from New Jersey and at least one misdemeanor from New Jersey. The State produced a copy of the 2002 New Jersey statute regarding homicide, which the trial court accepted as proof that a third-degree homicide in New Jersey should be counted as a Class F felony in North Carolina. The Court of Appeals held that the trial court erred because the State presented no evidence that the 2002 New Jersey homicide statute was unchanged from the 1987 version under which defendant was convicted. Therefore, the State failed to show that defendant's prior conviction was substantially similar to an offense in North Carolina classified as a Class I felony or higher. The case was remanded for resentencing.

H. Suppression of Prior Record

Defendant must prove violation of right to counsel *G.S. 15A-980*

***State v. Jordan*, 174 N.C. App. 479, 621 S.E.2d 229 (2005).** The trial court assigned defendant prior record points for his Class A1 and Class 1 misdemeanor convictions. The court denied defendant's pre-trial motion to suppress his convictions under G.S. 15A-980 as having been obtained in violation of his right to counsel. Defendant's sole evidence offered in support of his motion was his testimony that he did not have and could not afford counsel at each of the prior convictions. The Court of Appeals found no error. To meet his burden under G.S. 15A-980, a defendant must prove that he was indigent, that he had no counsel, and that he did not waive his right to counsel. *State v. Rogers*, 153 N.C. App. 203, 569 S.E. 2d 657 (2002). Defendant's proffer was insufficient. The Court rejected defendant's claims that G.S. 15A-980 impermissibly shifted the burden of proof to him in violation of *Boykin v. Alabama*, 395 U.S. 238, 23 L. Ed. 2d 274 (1969), and that the State could not prove the validity of his prior convictions because the records for some had been destroyed. Although *Boykin* established that a silent record does not support an inference on appeal that defendant properly waived his rights in a guilty plea, *Boykin*'s "presumption of invalidity" on direct review did not overcome the "presumption of regularity" that attaches to final judgments – including convictions that were unchallenged on direct appeal but collaterally attack in a later criminal case. The Court likewise found no merit to defendant's claim that *Shepard v. U.S.*, 544 U.S. 13, 161 L. Ed. 2d 205 (2005), required that a jury decide any disputes about the validity of prior convictions. The Sixth Amendment's requirement that a jury find any fact essential to increase a defendant's punishment is not implicated when defendant is attempting to show why his possible sentence should be decreased.

I. Provision of Prior Record Information

Step 3: Consider Aggravating and Mitigating factors.

A. Finding Aggravating or Mitigating Factors

Separate proceeding is discretionary *G.S. 15A-1340.16(a1)*

***State v Anderson*, 200 N.C. App. 216, 684 S.E.2d 450 (2009).** Under G.S. 15A-1340.16(a1), "[t]he jury impaneled for the trial of the felony may, in the same trial, also determine if one or more aggravating factors is present, unless the court determines that the interests of justice require that a separate sentencing proceeding be used to make that determination." The decision to hold a separate proceeding is a matter left to the trial court's discretion. Here, the Court of Appeals found no abuse of discretion in the trial court's failure to hold a separate proceeding on the issue of aggravating factors, inasmuch as defendant's counsel stated that she "wouldn't put on any evidence" regarding the factors.

Proof of aggravating factors

***State v. Johnson*, 181 N.C. App. 287, 639 S.E.2d 78 (2007).** Aggravating factors may be established under the theory of acting in concert. Therefore, the fact that the deadly weapon was

used by a co-defendant, rather than by defendant, did not preclude the jury from finding as an aggravating factor that defendant's offense of second-degree kidnapping was committed with the use of a deadly weapon, G.S. 15A-1340.16(d)(10).

***State v. Everette*, 361 N.C. 646, 652 S.E.2d 241 (2007).** The Supreme Court concluded that defense counsel stipulated to the aggravating factor that defendant was on pretrial release at the time of his offense, G.S. 15A-1340.16(d)(12). Counsel stated, "[Defendant] was on pre-trial release at the time[,]" and responded, "Yes," when the prosecutor asked, "So you stipulate that he was out on bond on those five charges?" Given the stipulation, the trial court did not violate the Sixth Amendment by finding the aggravating factor without submitting the issue to the jury.

***State v. Radford*, 156 N.C. App. 161, 576 S.E.2d 134 (2003).** The trial court found the non-statutory aggravating factor that the victim's psychological injuries were debilitating to an extent that she required counseling. The finding was based on the prosecutor's statement that the victim was receiving counseling. The Court of Appeals remanded the case for re-sentencing, holding that an aggravating factor cannot be established solely by an assertion by the prosecutor.

Proof of mitigating factors

***State v. Davis*, 206 N.C. App. 545, 696 S.E.2d 917 (2010).** Defendant entered guilty pleas to several offenses and stipulated to an aggravating factor. She asked the trial court to find certain statutory mitigating factors but offered no evidence in support thereof. The trial court sentenced defendant in the aggravated range and found no mitigating factors. The Court of Appeals upheld the aggravated sentences, holding that "defendant failed to present any evidence to support the factors presented." Her statement to the sentencing court, "I'm sorry for what I did. I just have a drug problem. I didn't mean to harm anybody. I ask God every day for forgiveness for what I did. I have a four-month-old son, and I'm sorry[,]" did not compel a finding that she accepted responsibility for her crimes under G.S. 15A-1340.16(e)(15). Notwithstanding her guilty plea, the statement did not unequivocally evince an admission of "culpability, responsibility or remorse, as well as guilt." *State v. Godley*, 140 N.C. App. 15, 28, 535 S.E.2d 566, 575 (2000) (quotation omitted). Likewise, defendant failed to show the "essential link" between her professed drug addiction and her crimes, or that her addiction significantly reduced her culpability under G.S. 15A-1340.16(e)(3). As for the remaining factors, the Court of Appeals noted that "[c]omments by defense counsel are not evidence and are not sufficient to carry defendant's burden of proof of mitigating factors." *State v. Norman*, 151 N.C. App. 100, 106, 564 S.E.2d 630, 634 (2002).

***State v. Hughes*, 136 N.C. App. 92, 524 S.E. 2d 63 (1999).** The trial court did not find any mitigating factors despite evidence presented by defendant. The Court of Appeals held that the trial court is required to find a mitigating factor only where the evidence supporting the factor is "substantial, uncontradicted, and manifestly credible." Because defendant's proffer failed to meet this standard, the trial court did not err.

Blakely violations generally

***State v. Norris*, 360 N.C. 507, 630 S.E.2d 915 (2006).** The trial court found one aggravating factor and three mitigating factors but imposed a presumptive sentence. While defendant's appeal was pending, the U.S. Supreme Court decided *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004). Defendant filed a motion for appropriate relief, asserting that the trial court's finding of an aggravating factor violated the Sixth Amendment. The North Carolina

Supreme Court held that a *Blakely* violation occurs only if a court relies on judicial findings to increase a sentence beyond what the jury's verdict alone would permit. Because defendant's sentence fell within the presumptive range for his offense and prior record level, the rulings in *Blakely* and *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005), were not inapposite.

***State v. Garcia*, 174 N.C. App. 498, 621 S.E.2d 292 (2005).** Defendant was sentenced as a Class C habitual felon with a Prior Record Level IV to a minimum prison term of 133 months and a maximum term of 167 months. The trial court made findings of aggravating and mitigating factors. Defendant appealed, alleging that the aggravating factors were found, and an aggravated sentence was imposed, in violation of his Sixth Amendment right to jury trial under *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004). The Court of Appeals found no error. Defendant's minimum sentence was at both the bottom of the aggravated range and the top of the presumptive range (the two ranges overlap). Allen requires only that "'[a]ny fact that increases the penalty for a crime *beyond the prescribed presumptive range* must be submitted to a jury and proved beyond a reasonable doubt'" (emphasis in original). Accordingly, because the trial court imposed a sentence within the presumptive range, no *Blakely* violation occurred.

Note: It is unclear whether a prior adjudication of juvenile delinquency under G.S. 15A-1340.16(d)(18a) is a "prior conviction" which may be found as an aggravating factor by the trial court, rather than the jury. *Compare State v. Boyce*, 175 N.C. App. 663, 669, 625 S.E.2d 553, 557 (2006) (no jury finding required), *aff'd in part*, 361 N.C. 670, 651 S.E.2d 879 (2007), *with State v. Yarrell*, 172 N.C. App. 135, 142, 616 S.E.2d 258, 263 (2005) (Under G.S. 7B-2412, an adjudication of juvenile delinquency is not a criminal conviction. Therefore, it may not be used to aggravate a defendant's sentence unless it is found by a jury beyond a reasonable doubt). The North Carolina Supreme Court has held that, where two decisions of the Court of Appeals are in conflict, the older of the conflicting decisions controls. *In re R.T.W.*, 359 N.C. 539, 542 n.3, 614 S.E.2d 489, 491 n.3 (citing *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36-37 (1989)), *superseded on other grounds by statute*, Act of Aug. 23, 2005, ch. 398, sec. 12, 2005 N.C. Sess. Laws 1455, 1460-61.

Blakely violation reviewed for harmless error

***State v. Sellars*, 191 N.C. App. 703, 664 S.E.2d 45 (2008).** The trial judge's *Blakely* violation was held harmless beyond a reasonable doubt, because any rational fact-finder would have found that defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person, G.S. 15A-1340.16(d)(8). The evidence showed that defendant fired a semi-automatic handgun at police officers in a convenience store parking lot – causing officers to return fire – while customers were in the parking lot and inside the store. Moreover, "[a] semi-automatic pistol in its normal use is hazardous to the lives of more than one person."

***State v. Walker*, 188 N.C. App. 331, 654 S.E.2d 722 (2008).** Defendant's sentence was aggravated based on the trial court's finding that he "joined with more than one other person in committing the offense and was not charged with committing a conspiracy." G.S. 15A-1340.16(d)(2). Applying *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006), the Court of Appeals held that the violation of defendant's Sixth Amendment right to a jury trial was not harmless beyond a reasonable doubt. Because "the evidence that defendant . . . joined with more than one other person in committing the robbery was overwhelming but not uncontroverted[,]" the failure to submit the issue to the jury did not quality as harmless

constitutional error.

***State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006)**. In light of *Washington v. Recuenco*, 548 U.S. 212, 165 L. Ed. 2d 466 (2006), the North Carolina Supreme Court held that a violation of defendant's Sixth Amendment rights under *Blakely v. Washington* is non-structural error and thus will not warrant reversal if the appellate court concludes that it was harmless beyond a reasonable doubt. The reviewing court "must determine from the record whether the evidence against the defendant was so 'overwhelming' and 'uncontroverted' that any rational fact-finder would have found the disputed aggravating factor beyond a reasonable doubt."

***State v. Hurt*, 361 N.C. 325, 643 S.E.2d 915 (2007).** Under *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004), "a judge may not find an aggravating factor on the basis of a defendant's admission unless that defendant personally or through counsel admits the necessary facts or admits that the aggravating factor is applicable."

***State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005), *withdrawn*, 360 N.C. 569, 635 S.E.2d 899 (2006)**, Consistent with procedures then prescribed by G.S. 15A-1340.16, the trial court found aggravating factors based on a preponderance of the evidence and sentenced defendant in the aggravated range. Defendant challenged his aggravated sentence as violating his Sixth Amendment right to a jury trial under *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004). The *Blakely* Court held that any fact other than a prior conviction which is used to increase defendant's sentence beyond what is authorized for the bare offense itself must be either admitted by defendant or found by a jury beyond a reasonable doubt. The North Carolina Supreme Court concluded that the reasoning of *Blakely* applied to factors supporting an aggravated sentence under G.S. 15A-1340.16. The Court further held that a Sixth Amendment violation under *Blakely* was structural error and thus reversible *per se*. The *Allen* Court withdrew its opinion after the United States Supreme Court ruled in *Washington v. Recuenco*, 548 U.S. 212, 165 L. Ed. 2d 466 (2006), that *Blakely* errors are non-structural and are subject to harmless constitutional error analysis.

B. Aggravated or Mitigated Sentences

Decision to depart from presumptive range is discretionary

***State v. Bivens*, 155 N.C. App. 645, 573 S.E.2d 259 (2002).** The trial court found that mitigating factors existed, and that they outweighed the aggravating factors, but sentenced defendant within the presumptive range. The Court of Appeals found no error. Just as judges have the discretion to impose a mitigated sentence when mitigating factors are found, they likewise have the discretion to decline to do so and to impose a sentence from within the presumptive range.

C. Requirement to Provide Written Reasons

Non-presumptive sentence: findings required

***State v. Bright*, 135 N.C. App. 381, 520 S.E.2d 138 (1999).** The trial court imposed a sentence from the aggravated range without making written findings of factors in aggravation. The Court of Appeals held that, unlike under the Fair Sentencing Act, the trial court is bound by Structured Sentencing's requirement of written findings when a defendant is sentenced outside of the presumptive range, even when the sentence is prescribed by a plea agreement.

Non-presumptive sentence: error in findings may be harmless

***State v. Everette*, 361 N.C. 646, 652 S.E.2d 241 (2007).** Even though three of the four aggravating factors found by the trial court were improper, the Supreme Court concluded that the errors were harmless. In imposing an aggravated sentence, the trial court explicitly found "that each one of the aggravating factors in and of itself independently outweighs all mitigating factors . . . [and] is in and of itself a sufficient basis for the imposition of the sentence . . . and outweighs all mitigating and justifies a sentence from within the aggravated range." The judgment included a finding that "each and every aggravated factor in and of itself outweighs all the mitigating factors and justifies from within the aggravated range this sentence." It thus was clear that the court would have imposed the aggravated sentence based on the single legitimate aggravator. The Supreme Court distinguished *State v. Ahearn*, 307 N.C. 584, 300 S.E.2d 689 (1983), based of the trial court's explicit finding.

Presumptive sentence: court must consider parties' evidence

***State v. Knott*, 164 N.C. App. 212 , 595 S.E.2d 172 (2004).** The trial court sentenced defendant immediately after the verdict was read, without allowing her to present evidence of mitigating factors. The Court of Appeals remanded for resentencing. Although a trial court need not make written findings when it sentences within the presumptive range, *State v. Rich*, 132 N.C. App. 440, 512 S.E.2d 441 (1999), *aff'd*, 351 N.C. 386, 527 S.E.2d 299 (2000), it must consider the parties' evidence of mitigating and aggravating circumstances, *State v. Kemp*, 153 N.C. App. 231, 569 S.E.2d 717 (2002).

Presumptive sentence: no findings required

***State v. Dorton*, 182 N.C. App. 34, 641 S.E.2d 357 (2007).** Because the trial court sentenced defendant within the presumptive range, it "did not err by declining to formally find or act on defendant's proposed mitigating factors, regardless whether evidence of their existence was uncontradicted and manifestly credible."

***State v. Streeter*, 146 N.C. App. 594, 553 S.E.2d 240 (2001).** The trial court considered evidence of aggravating and mitigating factors but sentenced from the presumptive range. The Court of Appeals upheld the decision of the trial court, finding that the decision to depart from the presumptive range is within the trial court's discretion.

***State v. Hilbert*, 145 N.C. App. 440, 549 S.E.2d 882 (2001).** If the trial court makes finding of aggravating factors, it must also find any mitigating factors supported by uncontradicted, substantial and credible evidence. *See also State v. Hughes*, 136 N.C. App. 92, 524 S.E. 2d 63 (1999) (The trial court is not required to find a mitigating factor absent "substantial, uncontradicted, and manifestly credible" evidence.)

***State v. Rich*, 132 N.C. App. 440, 512 S.E.2d 441 (1999), *aff'd*, 351 N.C. 386, 527 S.E.2d 299 (2000).** The trial court imposed a presumptive sentence and made no findings in mitigation, despite what defendant on appeal described as conclusive evidence of mitigating factors. The Court of Appeals held that the trial court need not make findings of aggravating and mitigating factors when it sentences within the presumptive range.

***State v. Caldwell*, 125 N.C. App. 161, 479 S.E.2d 282 (1997).** The trial court sentenced

defendant within the presumptive range. Defendant argued that even when sentencing within the presumptive range the trial court should be required to consider evidence of aggravating and mitigating factors, and that not to consider such evidence is an abuse of discretion. Relying on the plain language of the statute, the Court of Appeals held that the trial court has absolute discretion to sentence within the presumptive range and must take into account factors in aggravation and mitigation only when deviating from the presumptive range in sentencing.

D. Aggravating and Mitigating Factors

Aggravating factors

Aggravating factor must pertain to the sentencing offense

***State v. Jacobs,* 202 N.C. App. 71, 688 S.E.2d 726 (2010).** The trial court consolidated defendant's convictions for first degree burglary, robbery with a dangerous weapon, and misdemeanor impersonating a law enforcement officer. The court imposed an aggravated sentence based on four aggravating factors related to the misdemeanor offense. The Court of Appeals remanded for resentencing on the burglary conviction, quoting State v. Tucker, 357 N.C. 633, 588 S.E.2d 853 (2003): "Since the trial judge is required by the Structured Sentencing Act to enter judgment on a sentence for the most serious offense in a consolidated judgment, aggravating factors applied to the sentence for a consolidated judgment will only apply to the most serious offense in that judgment."

***State v. Spellman*, 167 N.C. App. 374, 605 S.E.2d 696 (2004).** Defendant was convicted of multiple felonies and sentenced in three judgments: one for second-degree kidnapping; the second for the consolidated convictions for common law robbery and misdemeanor assault with a deadly weapon; and the third for assault with a deadly weapon on a government official. The storekeeper victim of the misdemeanor assault, robbery and kidnapping was a different person than the government official (a North Carolina Highway Patrolman) injured by defendant's vehicle when he attempted to flee the scene. For all three judgments, the trial court found three aggravating factors, including that the victim suffered permanent and debilitating injury, G.S. 15A-1340.16(d)(19). The Court of Appeals remanded for resentencing on the kidnapping conviction. While the same aggravating factor may be used to enhance multiple sentences, there must be some evidence supporting the factor for each sentence. Because there was no evidence that the storekeeper suffered any injury, the permanent and debilitating injury defendant inflicted upon the state trooper could not be used to enhance the kidnapping sentence.

***State v. Harrison*, 164 N.C. App. 693, 596 S.E.2d 834 (2004).** Defendant pled guilty to multiple offenses, including assault with a deadly weapon on a government official and fleeing in a motor vehicle to elude arrest. Since defendant was an habitual felon, all of the offenses were treated as Class C felonies for sentencing purposes. The trial court consolidated the convictions into one judgment and found as aggravating factors that defendant created a great risk of danger to more than one person, G.S. 15A-1340.16(d)(8), and the offense was committed for the purpose of preventing a lawful arrest, G.S. 15A-1340.16(d)(3). Defendant appealed, arguing that these factors were based on evidence necessary to prove an element of an underlying offense, as proscribed by G.S. 15A-1340(d). The Court of Appeals affirmed, holding that where multiple offenses of the same class are consolidated for judgment, the sentence may be aggravated based on a factor that is an element of one, but not all, of the offenses.

"Evidence necessary to prove an element of the offense" *G.S. 15A-1340.16(d)*

***State v. Robertson*, 161 N.C. App. 288, 587 S.E.2d 902 (2003).** Upon his conviction for malicious conduct by a prisoner, defendant appealed the court's finding of an aggravating factor that he committed the offense "to hinder the lawful exercise of a governmental function or the enforcement of laws." G.S. 15A-1340.16(d)(5). The Court of Appeals concluded that this finding was not based on evidence necessary to prove an element of the offense as proscribed by G.S. 15A-1340.16(d). Malicious conduct by a prisoner only requires a general intent directed towards a guard. The conduct need not be intended to hinder the guard in his or her function. The aggravating factor, however, requires the specific intent to hinder a governmental function.

***State v. Sellers*, 155 N.C. App. 51, 574 S.E.2d 101 (2002).** Defendant was convicted of assault with a firearm on a law enforcement officer, assault with a deadly weapon inflicting serious bodily injury, and discharging a firearm into occupied property. The trial court found the aggravating factor that defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person, G.S. 15A-1340.16(d)(8). The Court of Appeals held that the State provided additional evidence in support of the factor beyond that required for the underlying offenses.

***State v. Payne*, 149 N.C. App. 421, 561 S.E.2d 507 (2002).** Defendant was convicted of insurance fraud and fraudulently burning a dwelling. The trial court found as an aggravating factor that the acts involved an attempted and actual taking of property of great monetary value. G.S. 15A-1340.16(d)(14). The Court of Appeals found no error, inasmuch as the amount of monetary damages sustained is not an element of either offense.

***State v. Demos*, 148 N.C. App. 343, 559 S.E.2d 17 (2002).** Defendant was convicted of second degree murder in the death of his estranged wife, and voluntary manslaughter in the death of his wife's acquaintance. The trial court aggravated defendant's sentences based, *inter alia*, upon a finding that each homicide "was part of a 'course of conduct' in which he killed the other victim." The Court of Appeals found no error. Relying on *State v. Ruff*, 349 N.C. 213, 505 S.E.2d 579 (1998), it held that structured sentencing allows a sentence to be aggravated by evidence necessary to prove elements of a contemporaneous conviction, provided the evidence is not also necessary to prove the sentencing offense.

***State v. Bowers*, 146 N.C. App. 270, 552 S.E.2d 238 (2001).** Defendant was convicted of taking indecent liberties with a child and aiding and abetting taking indecent liberties with a child. The victims were 13 and 14 years old. The trial court found the non-statutory aggravating factor that defendant had provided alcohol to the "children" who were his victims. Defendant challenged this finding under G.S. 15A-1340.16(d), on the ground that the victims' status as "children" under 16 years of age was also an essential element of the offense. The Court of Appeals disagreed. The offense of taking indecent liberties with a child requires proof that the victim was under the age of 16; the aggravating factor did not require such evidence. Moreover, "the victims' intoxication could have been considered by the trial court regardless of their age."

***State v. Crockett*, 138 N.C. App. 109, 530 S.E.2d 359 (2000).** The trial court found defendant guilty of two counts of statutory rape and four counts of sexual activity by a custodian. The trial court found as an aggravating factor for the statutory rape charges that defendant took advantage of a position of trust or confidence. G.S. 15A-1340.16(d)(15). Finding no error, the Court of Appeals held that evidence used to prove an element of one offense may also be used

to support an aggravating factor of a separate joined offense.

State v. Burgess**, 134 N.C. App. 632, 518 S.E.2d 209 (1999).** Defendant was convicted of felony child abuse, and the trial court found the aggravating factor that the victim was very young. G.S. 15A-1340.16(d)(11). Relying on *State v. Ahearn*, 307 N.C. 584, 300 S.E.2d 689 (1983), the Court of Appeals affirmed, noting that "the fact that [the victim] was *very young* (3 weeks old) was 'not an element necessary to prove felonious child abuse,'" which requires only that the child be less than 16 years old. Moreover, the victim's tender age made her particularly vulnerable.

***State v. Mullaney*, 129 N.C. App. 506, 500 S.E.2d 112 (1998).** Because defendant's violation of a position of trust is an essential element of embezzlement, it may not be used as an aggravating factor for this offense under G.S. 15A-1340.16(d).

***State v. Crisp*, 126 N.C. App. 30, 483 S.E.2d 462 (1997).** Defendant was convicted of one count of assault with a deadly weapon with intent to kill inflicting serious injury and five counts of assault with a deadly weapon inflicting serious injury. The trial court found two aggravating factors: the victims suffered permanent and debilitating serious injuries, and defendant used a weapon which normally would be hazardous to the lives of more than one person. G.S. 15A-1340.16(d)(8), (19). On appeal, defendant argued that these factors had been necessary to prove elements of the offenses – *i.e.*, serious injury and use of a deadly weapon – and thus could not be used to aggravate his sentence under G.S. 15A-1340.16(d). The Court of Appeals disagreed, distinguishing between the offense elements (that defendant inflicted serious injury, and that he used a deadly weapon) and the specific circumstances addressed by the aggravating factors (that the injury inflicted is permanent and debilitating, and that the deadly weapon used – here, a semi-automatic handgun – is by design hazardous to more than one person).

"The same item of evidence" proving multiple aggravating factors G.S. 15A-1340.16(d)

***State v. Beck*, 359 N.C. 611, 614 S.E.2d 274 (2005).** Defendant was found guilty of second-degree murder. The State presented a warrant for arrest from Florida as evidence that defendant had been out on pretrial release for a burglary case in Florida and that he was currently a fugitive. The trial court used this evidence to find two aggravating factors: that defendant committed the offense while on pretrial release, and that defendant was a fugitive from Florida. G.S. 15A-1340.16(d)(12), (20). The Court of Appeals remanded for resentencing on the ground that "the same item of evidence" (*i.e.*, the warrant) cannot be used to support more than one aggravating factor under G.S. 15A-1340.16(d). *State v. Beck*, 163 N.C. App. 469, 594 S.E.2d 94 (2004). The Supreme Court reversed, holding that "the same item of evidence" in G.S. 15A-1340.16(d) refers to a single evidentiary fact, rather than a single physical source of evidence. Therefore, the warrant was properly used to establish the factually distinct aggravating factors that defendant was on pretrial release and that he was a fugitive.

"Induced others" or "occupied a position of leadership" *G.S. 15A-1340.16(d)(1)*

***State v. Johnson*, 181 N.C. App. 287, 639 S.E.2d 78 (2007).** Sufficient evidence supported the jury's finding under G.S. 15A-1340.16(d)(1) that defendant occupied a position of leadership or dominance of his co-defendants in committing assault with a deadly weapon inflicting serious injury and kidnapping. The victim "testified that defendant was driving the vehicle that [he] was forced into, that defendant drove while [a co-defendant] beat [the victim], and that defendant told [the co-defendant] that they should not let [the victim] go and that they should kill him."

"Joined with more than one other person" *G.S. 15A-1340.16(d)(2)*

***State v. Boyd*, 177 N.C. App. 165, 628 S.E.2d 796 (2006).** Defendant was sentenced in the aggravated range upon a finding that he joined with more than one other person in committing the offense and was not charged with a conspiracy. G.S. 15A-1340.16(d)(2). The evidence showed that defendant and his girlfriend sold drugs out of their home. The Court of Appeals remanded for resentencing, absent evidence that defendant joined with "more than one" other person in committing his offense. *But cf. State v. Hurt*, 361 N.C. 325, 643 S.E.2d 915 (2007) (upholding a finding that "defendant joined with one other person in committing the offense and was not charged with committing a conspiracy" as a non-statutory aggravating factor under G.S. 15A-1340.16(d)(20)).

Committed against or caused injury to a law enforcement officer *G.S. 15A-1340.16(d)(6)*

***State v. Carter*, __ N.C. App. __, 711 S.E.2d 515 (2011).** Upset at being injured in a brawl, defendant fired a semi-automatic handgun into a crowd of people, striking and killing a sheriff's deputy who was attempting to break up the fight. Defendant appealed his aggravated sentence for second degree murder, challenging the submission to the jury of the aggravating factor "[t]hat the offense was committed against or [p]roximately caused serious injury to a present or former law-enforcement officer while engaged in the performance of that person's official duties, or because of the exercise of that person's official duties" under G.S. 15A-1340.16(d)(6). The Court of Appeals found no error, noting that G.S. 15A01340.16(d)(6) may apply to an offense committed either (1) *while* an officer is engaged in the performance of official duties ("the 'engaged in' prong"), or (2) *because of* the officer's exercise of his or her official duties ("the 'because of' prong"). Unlike the "because of" prong (which concerns a defendant's motive), the Court held "that subsection (d)(6)'s 'engaged in' prong does not require the State to prove that the defendant knew or reasonably should have known that the victim was a member of the protected class engaged in the exercise of his or her official duties."

"Especially heinous, atrocious, or cruel" *G.S. 15A-1340.16(d)(7)*

***State v. Hunter*, 208 N.C. App. 506, 703 S.E.2d 776 (Dec. 21, 2010).** "[A] reasonable juror could determine that defendant's fatal assault upon his seventy-two year old grandmother whom he stabbed with a knife, struck in the head with a clothes iron, strangled with a power cord from the iron and impaled with a golf club shaft eight inches into her back and chest was especially heinous, atrocious and cruel" under G.S. 15A-1340.16(d)(7).

***State v. Choppy*, 141 N.C. App. 32, 539 S.E.2d 44 (2000).** Defendant argued that the trial court erred in aggravating his sentences for felonious assault and attempted murder on the basis that the offenses were especially heinous, atrocious, or cruel, G.S. 15A-1340.16(d)(7). The Court of Appeals found no error. Quoting *State v. Blackwelder*, 309 N.C. 410, 306 S.E.2d 783 (1983), it held that the trial court correctly focused "on whether the facts of the case disclose excessive brutality, or physical pain, psychological suffering, or dehumanizing aspects not normally present in that offense."

"Knowingly created a risk of death to more than one person" *G.S. 15A-1340.16(d)(8)*

***State v. Borges*, 183 N.C. App. 240, 644 S.E.2d 250 (2007).** Defendant was convicted of second-degree murder and assault with a deadly weapon inflicting serious injury for a fatal traffic

collision committed while he was intoxicated. The trial court entered aggravated sentences upon a jury finding that "defendant knowingly created a risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person." G.S. 15A-1340.16(d)(8). On appeal, defendant claimed that the court violated G.S. 15A-1340.16(d) by considering an aggravating factor that was based on "evidence necessary to prove an element of the offense[,]" *i.e.*, that he operated a motor vehicle and that the vehicle was a deadly weapon. The Court of Appeals found no error. The aggravator required proof of additional facts by additional evidence, to wit: "(1) that [d]efendant knowingly created a great risk of death; and (2) that the vehicle would normally be hazardous to the lives of more than one person."

***State v. Fuller*, 138 N.C. App. 481, 531 S.E.2d 861 (2000).** Defendant was driving while impaired and caused the death of two people. Upon his conviction for two counts of second-degree murder, the trial court found the aggravating factor that he created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person, G.S. 15A-1340.16(d)(8). The Court of Appeals upheld the finding, stating that defendant's operation of the automobile did not constitute one of the elements of second degree murder, and that a legally intoxicated person driving an automobile is sufficient to support the aggravating factor.

Victim was very young, very old, etc. *G.S. 15A-1340.16(d)(11)*

***State v. Hilbert*, 145 N.C. App. 440, 549 S.E.2d 882 (2001).** Defendant was convicted of first-degree burglary for entering a home containing young children. The Court of Appeals held that the trial court erred in finding the aggravating factor that the victim was very young, G.S. 15A-1340.16(d)(11). There was no evidence that defendant targeted the home because of the presence of young children, that he knew the age of the occupants before the break-in, that he entered the children's rooms, or that they were aware that he was in the house.

***State v. Rudisill*, 137 N.C. App. 379, 527 S.E.2d 727 (2000).** Defendant pled guilty to taking indecent liberties with a child and received an aggravated sentence based on the trial court's finding that the seven-year-old victim was "very young." G.S. 15A-1340.16(d)(11). The Court of Appeals vacated the sentence and remanded for a new sentencing hearing. The State adduced no evidence, and the trial court made no finding, that the victim "was more vulnerable to the assault in this case than an older child would have been . . . simply because of his age."

***State v. Deese*, 127 N.C. App. 536, 491 S.E.2d 682 (1997).** The Court of Appeals reversed the trial court's finding of the aggravating factor that the 73-year-old victim was very old, G.S. 15A-1340.16(d)(11), absent proof that his advanced age increased his vulnerability.

Offense committed while on pretrial release *G.S. 15A-1340.16(d)(12)*

***State v. Moore*, 188 N.C. App. 416, 656 S.E.2d 287 (2008).** The trial court did not err in using the fact that defendant was on probation and pre-trial release at the time of his offenses to both increase his prior record level and aggravate his sentence. Under G.S. 15A-1340.14(b)(7), one prior record point results from a defendant committing a felony while on probation, parole, or post-release supervision. The fact that "defendant committed the offense while on pretrial release on another charge" is an aggravating factor under G.S. 15A-1340.16(d)(12).

***State v. Sellers*, 155 N.C. App. 51, 574 S.E.2d 101 (2002).** Defendant was convicted of assault

with a firearm on a law enforcement officer, assault with a deadly weapon inflicting serious bodily injury, and discharging a firearm into occupied property. The trial court found as an aggravating factor that defendant committed the offense while on pretrial release, G.S. 15A-1340.16(d)(12). The Court of Appeals reversed this finding, holding that proof of defendant's prior arrest paired with an absence of proof that a trial occurred is not sufficient to support the conclusion that defendant was on pretrial release.

"Involved a person under the age of 16 in the . . . crime" *G.S. 15A-1340.16(d)(13)*

***State v. Boyd*, 162 N.C. App. 159, 595 S.E.2d 697 (2004).** The evidence showed that defendant and a 13-year-old boy engaged in a sale of crack cocaine to a police officer. Defendant was convicted of conspiracy to sell a controlled substance, but acquitted of contributing to the delinquency of a minor and employing and intentionally using a minor to commit a controlled substance offense. The sentencing court found as an aggravating factor that defendant had involved a person under the age of 16 in the commission of a crime. G.S. 15A-1340.16(d)(13). Citing *State v. Marley*, 321 N.C. 415, 364 S.E.2d 133 (1987), the Court of Appeals acknowledged that a jury's finding of guilt on a lesser included offense of a charge will bar the sentencing court from finding an essential element of the greater, charged offense which was not found by the jury. Here, however, the jury's not guilty verdicts did not evince a determination that there was insufficient evidence to prove that defendant's 13-year-old accomplice was a minor. Ample evidence supported the sentencing court's finding that the boy was under 16.

***State v. Smarr*, 146 N.C. App. 44, 551 S.E.2d 881 (2001).** Defendant was 16 years old and convicted of second degree murder, three counts of attempted robbery with a dangerous weapon, aiding and abetting an assault with a deadly weapon inflicting serious injury, and conspiracy to commit a felony. The trial court found as an aggravating factor that defendant had involved a person under the age of 16 in the crime, G.S. 15A-1340.16(d)(13). In upholding the finding, the Court of Appeals discerned no legislative intent to require a particular age difference between defendant and the person under age 16 involved in the crime.

"Great monetary value" or loss *G.S. 15A-1340.16(d)(14)*

***State v. Cobb*, 187 N.C. App. 295, 652 S.E.2d 699 (2007).** Defendant pled guilty to three counts of embezzling $100,000 or more, a Class C felony under G.S. 14-90. The indictments alleged embezzlements of $404,436, $296.901, and $109,763. The trial court aggravated defendant's sentences for the two counts involving the higher dollar amounts, finding that the offenses entailed "the actual taking of property of great monetary value" under G.S. 15A-1340.16(d)(14). Defendant claimed on appeal that this aggravating factor was grounded in the same evidence used to establish an element of the offense, in violation of G.S. 15A-1340.16(d). The Court of Appeals upheld the sentences, finding that (1) defendant admitted the amounts alleged in the indictments by pleading guilty; (2) the trial court did not find the aggravating factor for the count involving an embezzlement of $109,763, which was just above Class C felony threshold of $100,000; and (3) $404,436 and $296,901 "were sums of 'great monetary value' when compared with the threshold amount required for the offense of $100,000[.]" The Court of Appeals declined to establish a specific ratio between the amount embezzled and the statutory threshold which will suffice to support the aggravating factor.

***State v. Pender*, 176 N.C. App. 688, 627 S.E.2d 343 (2006).** Defendant was sentenced in the aggravated range (under the Fair Sentencing Act) for armed robbery and assault with a deadly

weapon inflicting serious injury. Defendant robbed three men, taking $1,300 and $700 from the first two, and shooting the third in the buttocks, with resulting medical costs of almost $30,000. The trial court found as an aggravating factor that the offense involved an actual taking of property of great monetary value. G.S. 15A-1340.16(d)(14). The Court of Appeals remanded for resentencing, holding that losses of $1,300 and $700 did not amount to "great monetary value" and noting that the smallest loss recognized to date as "great monetary value" was $2,500.

***State v. Godley*, 140 N.C. App. 15, 535 S.E.2d 566 (2000).** Defendant was convicted of assault with a deadly weapon inflicting serious injury. The trial court found as an aggravating factor that the offense involved damage causing great monetary loss, G.S. 15A-1340.16(d)(14), even though there was no evidence that the assault resulted in damage to the victim's property. Instead, the State averred that the victim sustained expenses including hospital bills. The Court of Appeals reversed, holding that monetary loss under G.S. 15A-1340.16(d)(14) must result from damage to property.

***State v. Hendricks*, 138 N.C. App. 668, 531 S.E.2d 896 (2000).** The trial court aggravated defendant's sentence for larceny, finding that that the offense involved the taking of property of great monetary value. G.S. 15A-1340.16(d)(14). The indictment listed the value of the property taken; and the prosecutor stated the amount in the summary of facts during the plea hearing. The Court of Appeals held that there was sufficient evidence to support the finding. When defendant pled guilty to larceny, his plea served as an admission of guilt as to all facts listed in the indictment. Moreover, defendant did not rebut the prosecutor's statement of facts.

"Took advantage of a position of trust or confidence" *G.S. 15A-1340.16(d)(15)*

***State v. Blakeman*, 202 N.C. App. 259, 688 S.E.2d 525 (2010).** The relationship between the 13-year-old victim and defendant, her best friend's stepfather, was insufficient to support the aggravating factor that he "took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense." G.S. 15A-1340.16(d)(15). Defendant was convicted of statutory sex offense and taking indecent liberties with a minor for acts committed when the victim spent the night at her best friend's house. The Court of Appeals found "no evidence of a familial relationship between [the victim] and [d]efendant, and no evidence that [she] and [d]efendant had a close personal relationship or that [she] depended or relied on [d]efendant for any physical or emotional care."

***State v. Meynardie*, 361 N.C. 416, 646 S.E.2d 530 (2007) (*per curiam*).** Defendant received aggravated sentences for crimes committed against B.H., the daughter of his ex-girlfriend, upon a finding that he took advantage of a position of trust or confidence to commit the offense. G.S. 15A-1340.16(d)(15). Absent "any description of the relationship existing among defendant, B.H., and B.H.'s mother at the time of the offense," the Supreme Court remanded "for resentencing, where evidence of the existence of this and other factors in aggravation may be presented to the jury and factors in mitigation may be considered by the court."

***State v. Ingram*, 160 N.C. App. 224, 585 S.E.2d 253 (2003).** Defendant was convicted of armed robbery. The victim restaurant had been defendant's employer in the past, but defendant had not worked there for five or six months. The trial court found as an aggravating factor that defendant took advantage of a position of trust, G.S. 15A-1340.16(d)(15). Finding no case law which recognized an abuse of a position of trust by a former employee who had not worked at the victim restaurant for six months, the Court of Appeals held the aggravating factor to be inappropriate

and remanded for resentencing.

***State v. Mann*, 355 N.C. 294, 560 S.E.2nd 776 (2002).** The trial court found as an aggravating factor that defendant took advantage of a position of trust or confidence, G.S. 15A-1340.16(d)(15). The Court of Appeals found that the evidence at most showed that defendant and his victim coworker enjoyed an amiable work relationship and perhaps even a friendship, but that it did not demonstrate "the existence of a relationship between defendant and victim that was generally conducive to reliance of one upon the other."

***State v. Murphy*, 152 N.C. App. 335, 567 S.E.2d 442 (2002).** Defendant pled guilty to six counts of obtaining property by false pretenses. The trial court found, *inter alia*, that defendant took advantage of a position of trust or confidence to commit the offenses, G.S. 15A-1340.16(d)(15). As to the five counts in which defendant posed as a loan broker and obtained substantial down-payments from his victims to secure non-existent loans from a third party, the Court of Appeals found that the evidence showed "a relationship between the defendant and [the victims] generally conducive to reliance of one upon the other[,]" as required under G.S. 15A-1340.16(d)(15). Moreover, the Court noted "that the 'trust or confidence' aggravating factor is not limited to friendships and familial relationships." In the sixth case, however, the evidence showed that defendant committed the crime of embezzlement, rather than obtaining property by false pretenses. He used his position in an association (which included access to the financial records and check-writing authority), to withdraw funds from its bank account and convert them to his own use. Therefore, the Court remanded for the trial court to enter judgment on the offense of embezzlement. Moreover, because the elements of embezzlement include obtaining property through a position of trust, and because evidence that is used to prove an element of the crime cannot also support an aggravating factor under G.S. 15A-1340.16(d), defendant was entitled to resentencing on this count without the aggravator in G.S. 15A-1340.16(d)(15).

***State v. Ballard*, 349 N.C. 286, 507 S.E.2d 38 (1998) (*per curiam*).** The trial court found as an aggravating factor that defendant took advantage of a position of trust or confidence to commit the offense. G.S. 15A-1340.16(d)(15). Adopting the dissenting opinion of the Court of Appeals, the Supreme Court held that the mere existence of a relationship of trust between defendant and the victim is insufficient to support this aggravating factor; the evidence must show that defendant relied upon the relationship to facilitate commission of the crime.

"Because of the victim's race, color, religion," etc. *G.S. 15A-1240.16(d)(17)*

***State v. Choppy*, 141 N.C. App. 32, 539 S.E.2d 44 (2000).** Defendant was found guilty of four counts of assault with a deadly weapon with intent to kill inflicting serious injury, four counts of attempted first-degree murder, two counts of conspiracy to commit first-degree murder, one count of discharging a firearm into occupied property, and one count of possession of a firearm by a felon. The trial court imposed aggravated sentences for conspiring to murder, attempting to murder, and feloniously assaulting one of the victims based on the aggravating factor that defendant committed these crimes because of this victim's race. G.S. 15A-1340.16(d)(17). On appeal, defendant argued that because four of his five victims on the night in question were not black, race was not a motivating factor in the attack on this victim. The Court of Appeals held that defendant's motivation for attacking the other victims was irrelevant in determining whether the attack on this victim was racially motivated. Given the State's evidence that this victim was singled out because he was black, the trial court's sentence was proper.

***State v. Hatcher*, 136 N.C. App. 524, 524 S.E.2d 815 (2000).** Defendant was found guilty of two counts of robbery with a dangerous weapon. Evidence showed that defendant and his accomplice targeted Hispanic victims "because they thought Hispanics carry large sums of cash and are less likely to report crimes committed against them." The trial court found in aggravation that the offenses were committed against the victims because of their race, color, religion, or country of origin. G.S. 15A-1340.16(d)(17). Defendant argued on appeal that this factor applies only to crimes motivated by racial or ethnic *animus*. The Court of Appeals disagreed, finding no such requirement in the statute's language.

Prior adjudication of delinquency for a Class A – E felony *G.S. 15A-1340.16(d)(18a)*

***State v. Rivens*, 198 N.C. App. 130, 679 S.E.2d 145 (2009).** Defendant's sentence was aggravated upon a finding that he had a prior adjudication of juvenile delinquency for an offense that would have been a Class A through E felony if committed by an adult, G.S. 15A-1340.16(d)(18a). Despite the lack of an adjudication order in the juvenile court file, the Court of Appeals found sufficient evidence to support the aggravating factor. A police officer testified to being present when defendant tendered an admission to a charge of delinquency for a B2 felony in juvenile court. A clerk of court testified that court records contained a Transcript of Admission by Juvenile, on which defendant had admitted the crime of second-degree murder. Relying on G.S. 15A-1331(b), the Court of Appeals noted that, for sentencing purposes, "a person has been convicted when he has been adjudged guilty or has entered a plea of guilty or no contest[,]" whether or not judgment was entered thereon.

***State v. Taylor*, 128 N.C. App. 394, 496 S.E.2d 811, *aff'd*, 349 N.C. 219, 504 S.E.2d 785 (1998).** The trial court found as an aggravating factor that defendant had been previously adjudicated delinquent for second degree rape. Defendant argued that G.S. 15A-1340.16(d)(18a), was unconstitutionally applied to him, because it was not in existence at the time of his delinquency adjudication. The Court of Appeals held that G.S. 15A-1340.16(d)(18a) does not violate the *ex post facto* clauses of the Constitution, because it does not retroactively punish conduct that previously was not criminalized nor does it aggravate the prior delinquency adjudication or inflict a greater punishment for that conduct than allowed at the time the delinquent act was committed. There was no denial of due process because defendant had adequate notice at the time of the current offense that his prior adjudication could be used to aggravate his sentence, and he had a full hearing at the time of the delinquency adjudication.

Inflicted serious injury that is "permanent and debilitating" *G.S. 15A-1240.16(d)(19)*

***State v. Wampler*, 145 N.C. App. 127, 549 S.E.2d 563 (2001).** Defendant was convicted of assault with a deadly weapon with intent to kill inflicting serious injury. The trial court found as an aggravating factor that the victim sustained a serious injury that is permanent and debilitating. G.S. 15-1340.16(d)(19). The Court of Appeals held the victim's injuries exceeded what was necessary to establish the "serious injury" element of the offense and could thus be used to aggravate defendant's sentence. Specifically, the victim suffered "permanent disfigurement of his fingers, surgery, loss of use and impairment. Moreover, the victim cannot bend his fingers and will always have a steel plate and screws in his hand."

Any factor "reasonably related to the purposes of sentencing" *G.S. 15A-1340.16(d)(20)*

***State v. Moore*, 188 N.C. App. 416, 656 S.E.2d 287 (2008).** The fact that defendant was on

probation at the time of the offense was properly found as a non-statutory aggravator under G.S. 15A-1340.16(d)(20), even though G.S. 15A-1340.14(b)(7) also assigns defendant one prior record point for committing a felony while on probation, parole, or post-release supervision. Although "[e]vidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation," G.S. 15A-1340.16(d), there is no bar against using the same evidence to establish a prior record point under and an aggravating factor.

***State v. Hurt*, 361 N.C. 325, 643 S.E.2d 915 (2007).** Defendant pled guilty to second-degree murder and received an aggravated sentence. As one of three aggravating factors, the trial judge modified the statutory factor in G.S. 15A-1340.16(d)(2) to find that "defendant joined with *one* other person in committing the offense and was not charged with committing a conspiracy" (emphasis in original). Reversing the Court of Appeals, the North Carolina Supreme Court found that defendant's act of joining with another to "work violence against a single victim" increased his culpability and was thus a valid non-statutory aggravating factor. *State v. Hurt*, 359 N.C. 840, 616 S.E.2d 910 (2005). The Court subsequently remanded for resentencing based on the ruling in *North Carolina v. Speight*, 548 U.S. 923, 165 L. Ed. 2d 983 (2006). However, its 2007 opinion explicitly left "undisturbed our analysis of the aggravating factor at issue in that opinion, which reversed the decision of the Court of Appeals[.]"

***State v. Speight*, 186 N.C. App. 93, 650 S.E.2d 452 (2007).** Defendant was convicted of two counts of involuntary manslaughter for killing two people while driving under the influence of alcohol, THC, and morphine. In aggravation of each count of manslaughter, the trial judge found, *inter alia*, that "in the course of his conduct, defendant killed another." The Court of Appeals upheld this finding as a non-statutory aggravating factor under G.S. 15A-1340.16(d)(20).

***State v. Harris*, 166 N.C. App. 386, 602 S.E.2d 697 (2004), *aff'd in non-pertinent part and rev'd in non-pertinent part*, 360 N.C. 145, 622 S.E.2d 615 (2005).** Defendant was convicted of common law robbery and second degree rape. The trial court found the non-statutory aggravating factor that "defendant is a predator." The Court of Appeals held that the term "predator" as related to sex offenses is a specifically defined legal classification under G.S. 14-208.6(6) and was not properly used as a non-statutory aggravating factor under G.S. 15A-1340.16(d)(20).

***State v. Robertson*, 161 N.C. App. 288, 587 S.E.2d 902 (2003).** Appealing his sentence for malicious conduct by a prisoner, defendant challenged the trial court's reliance on the non-statutory aggravating factor that the "defendant breached his assurance of good behavior [in court,]" inasmuch as he had already been found in contempt of court. The Court of Appeals found no double jeopardy violation. The contempt proceeding arose from defendant's act of overturning a table and shouting expletives; the aggravating factor was based on his feigning heart problems.

***State v. Robertson*, 149 N.C. App. 563, 562 S.E.2d 551 (2002).** Defendant was convicted of attempted first degree rape and second degree kidnapping. The trial court found as a non-statutory aggravating factor that "defendant unnecessarily and maliciously subjected the victim to degradation and undue humiliation by shamefully performing a loathsome act of masturbation in her presence and by compelling the victim to disrobe and reveal her naked body after leading her to believe she would be released unharmed if she did so." Under G.S. 15A-1340.16(d)(20), non-statutory aggravating factors must be reasonably related to the purposes of sentencing. The Court of Appeals ruled that this factor was not reasonably related.

***State v. Norman*, 151 N.C. App. 100, 564 S.E.2d 630 (2002).** Defendant pled guilty to attempted second-degree rape, first-degree burglary, and conspiracy to commit first-degree burglary. The Court of Appeals held that the trial court properly aggravated defendant's sentences based on the non-statutory aggravating factor that the victims were asleep, because this made them more vulnerable and susceptible to injury or victimization.

***State v. Rollins*, 131 N.C. App. 601, 508 S.E.2d 554 (1998).** Defendant was found guilty of discharging a firearm into occupied property and assault with a deadly weapon. On its own motion, the trial court found as a non-statutory aggravating factor that defendant attempted to dispose of evidence by giving the gun to a third party immediately after committing the offenses. On appeal, defendant argued that this aggravating factor violated his Fifth Amendment privilege against self-incrimination. The Court of Appeals agreed, holding that defendant's actions did not rise to the level of affirmative misconduct sufficient to outweigh his right to remain silent. There was no evidence that defendant made misrepresentations to law enforcement or deliberately hindered an investigation, which had yet to focus on him at the time he transferred the weapon.

***State v. Applewhite*, 127 N.C. App. 677, 493 S.E.2d 297 (1997).** Defendant was convicted of attempted armed robbery and assault with a deadly weapon inflicting serious injury. The Court of Appeals upheld the trial court's finding as a non-statutory aggravating factor that defendant left the victim without making any effort to save his life.

Mitigating factors

Suffered from a condition significantly reducing culpability *G.S. 15A-1340.16(e)(3)*

***State v. Davis*, 206 N.C. App. 545, 696 S.E.2d 917 (2010).** After pleading guilty to several offenses, defendant stated to the trial court, "I'm sorry for what I did. I just have a drug problem. I didn't mean to harm anybody. I ask God every day for forgiveness for what I did. I have a four-month-old son, and I'm sorry." The Court of Appeals held that defendant's statement did not require the trial court to find the mitigating factor in G.S. 15A-1340.16(e)(3), because it did not conclusively prove that defendant's avowed drug addiction was a condition significantly reducing her culpability for her crimes.

Strong provocation, or extenuating relationship with the victim *G.S. 15A-1340.16(e)(8)*

***State v. Deese*, 127 N.C. App. 536, 491 S.E.2d 682 (1997).** The trial court declined to find the mitigating factor that defendant acted under extreme provocation, G.S. 15A-1340.16(e)(8). The Court of Appeals found no error. Only if defendant proves by uncontradicted evidence that he acted under circumstances constituting strong provocation must the trial court consider this factor. Here, the evidence showed that defendant had the opportunity to "cool his blood."

"Accepted responsibility for the defendant's criminal conduct" *G.S. 15A-1340.16(e)(15)*

***State v. Davis*, 206 N.C. App. 545, 696 S.E.2d 917 (2010).** After pleading guilty to several offenses, defendant stated to the trial court, "I'm sorry for what I did. I just have a drug problem. I didn't mean to harm anybody. I ask God every day for forgiveness for what I did. I have a four-month-old son, and I'm sorry." The Court of Appeals held that defendant's statement did not require the trial court to find the mitigating factor that defendant accepted responsibility for her

crimes under G.S. 15A-1240.16(e)(15). The statement did not unequivocally evince an admission of "culpability, responsibility or remorse, as well as guilt." *State v. Godley*, 140 N.C. App. 15, 28, 535 S.E.2d 566, 575 (2000) (quotation omitted).

***State v. Godley*, 140 N.C. App. 15, 535 S.E.2d 566 (2000).** Defendant was convicted of assault with a deadly weapon inflicting serious injury. The Court of Appeals upheld the trial court's failure to find the mitigating factor that defendant voluntarily acknowledged wrongdoing in connection with the offense, G.S. 15A-1340.16(e)(11). Defendant's testimony "that he raised up [his] hand and the gun went off" did not evince an acceptance of responsibility. Nor was defendant's apology to the victim's family – after the jury returned the guilty verdict – so persuasive that [his] acceptance of responsibility for his conduct is the only reasonable inference that can be drawn from the statement."

Entering or completing a drug or alcohol treatment program *G.S. 15A-1340.16(e)(16)*

***State v. Hilbert*, 145 N.C. App. 440, 549 S.E.2d 882 (2001).** In sentencing defendant in the aggravated range for first-degree burglary, the trial court erred in failing to find as a mitigating factor that he had completed a drug treatment program while awaiting trial. G.S. 15A-1340.16(e)(16). Defendant adduced a certificate verifying successful completion of the program, no objection was made by the State, and no contrary evidence was presented. Having imposed an aggravated sentence, the trial court was obliged to find any mitigating factor that was supported by uncontradicted, substantial, and credible evidence.

"Support system in the community" *G.S. 15A-1340.16(e)(18)*

***State v. Applewhite*, 127 N.C. App. 677, 493 S.E.2d 297 (1997).** The Court of Appeals rejected defendant's claim that the trial court should have found the mitigating factor that he has a support system in the community, G.S. 15A-1340.16(e)(18), despite his failure to request the finding at sentencing. The supporting evidence was not sufficient to mandate a finding.

Step 4: Select a Minimum Sentence from the Appropriate Sentence Range.

A. Minimum Sentence Ranges

B. Minimum Sentence Enhancements

1. Firearm or Deadly Weapon

Enhancement must be alleged in indictment

***State v. Wimbish*, 147 N.C. App. 287, 555 S.E.2d 329 (2001).** Defendant pled guilty to several charges including one count of first-degree burglary. The plea agreement specified that the firearm enhancement statute would apply to the burglary charge. All sentences were to run consecutively. The Court of Appeals, citing *State v. Lucas*, 353 N.C. 568, 548 S.E.2d

712 (2001), held that the trial court erred in imposing the firearm enhancement statute because no indictment alleged the firearm enhancement factors. Defendant's plea of guilty had no bearing on the requirement that statutory factors supporting an enhancement must be included in the indictment. In *State v. Bennett*, 271 N.C. 423, 425, 156 S.E.2d 725, 726 (1967) (citing 22 C.J.S. Criminal Law § 423(1)), the Supreme Court held that "a defendant, called upon to plead to an indictment, cannot plead guilty to an offense which the indictment does not charge him with having committed." Even though the firearm enhancement statute was mentioned in the plea agreement, it was not included in an indictment. Thus, defendant was not bound by his plea allowing enhancement of his sentence.

***State v. Lucas*, 353 N.C. 568, 548 S.E.2d 712 (2001).** Relying on *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000), the North Carolina Supreme Court held that, where the State seeks to apply the firearm enhancement in G.S. 15A-1340.16A, it must allege the statutory factors supporting the enhancement in the indictment (which may be the same indictment as the underlying offense), and prove them beyond a reasonable doubt to a jury. Because these procedures were not followed, the Court vacated defendant's sentence and remanded for entry of an unenhanced sentence.

Firearm enhancement adds 60 months to minimum sentence

***State v. Trusell*, 144 N.C. App. 445, 548 S.E.2d 560 (2001).** Defendant pled guilty to second-degree kidnapping and had his sentence enhanced pursuant to the firearm enhancement statute. The Court of Appeals found that the trial court properly sentenced defendant when it selected a minimum term of imprisonment for the offense, enhanced the minimum term by 60 months, and then determined the applicable maximum term of imprisonment according to the chart contained in G.S. 15A-1340.17(e).

Firearm enhancement requires use of actual firearm

***State v. Williams*, 127 N.C. App. 464, 490 S.E.2d 583 (1997).** The trial court erroneously applied the firearm enhancement in G.S. 15A-1340.16A, despite the victim's testimony was that the object displayed by defendant was only a cigarette lighter shaped like a gun. The Court of Appeals held that the trial court may not apply the firearm enhancement where the evidence at trial conclusively shows that no gun was displayed, even though it appeared to the victim at the time of the offense that a gun was displayed.

Use of firearm as element of underlying offense

***State v. Ruff*, 349 N.C. 213, 505 S.E.2d 579 (1998).** The trial court enhanced defendant's sentence for second-degree kidnapping pursuant to G.S. 15A-1340.16A, based on evidence that he used a gun during the offense. Defendant appealed his enhanced sentence, arguing that his use of the gun was an essential element of his contemporaneous conviction for first-degree rape. In upholding the sentence, the Supreme Court noted that the underlying felony which was enhanced was the second-degree kidnapping. Because use of a firearm is not an essential element of second-degree kidnapping, the trial court properly enhanced defendant's sentence under G.S. 15A-1340.16A. It was irrelevant that defendant's use of the gun was the gravamen of the first-degree rape, because the trial court did not apply the firearm enhancement to this offense. *See also State v. Vaughters*, __ N.C. App. __, 725 S.E.2d 17 (2012) (disavowing *Brice*, "[t]o the extent that *Brice* is inconsistent with *State v.Ruff*," to hold

that "using a firearm is not an essential element of first degree kidnapping and the trial court was correct to find the use of a firearm as an aggravating factor" under former G.S. 15A-1340.4(a)(1) (Cum.Supp.1981), the Fair Sentencing Act predecessor to G.S. 15A-1340.16(d)).

***State v. Brice*, 126 N.C. App. 788, 486 S.E.2d 719 (1997).** The trial court erred by enhancing defendant's second degree kidnapping sentence based on his use of a firearm. The Court of Appeals held that evidence of the use of a firearm was relied upon to prove the necessary element of restraint for the kidnapping charge and thus could not be used to enhance defendant's sentence under G.S. 15A-1340.16A.

***State v. Evans*, 125 N.C. App. 301, 480 S.E.2d 435 (1997).** The trial court sentenced defendant within the aggravated range for armed robbery and enhanced his sentence for kidnapping by 60 months pursuant to G.S. 15A-1340.16A for use of a firearm. Defendant argued that the trial court violated the constitutional prohibition on double jeopardy by enhancing his kidnapping sentence for use of a firearm and imposing a consecutive sentence for armed robbery, because the evidence of use of a firearm for purposes of G.S. 15A-1340.16A was also relied upon to prove the elements of armed robbery. The Court of Appeals found no error. The firearm enhancement may apply unless the underlying felony requires proof of use of a firearm. Here, defendant's use of the firearm was not used to prove the elements of his kidnapping conviction. Moreover, because kidnapping and armed robbery are two distinct criminal offenses requiring proof of different elements, consecutive punishments for these offenses did not constitute double jeopardy.

***State v. Smith*, 125 N.C. App. 562, 481 S.E.2d 425 (1997).** The trial court applied the firearm enhancement to defendant's sentence for voluntary manslaughter. The Court of Appeals vacated the sentence, holding that if evidence of the use of a firearm is relied upon in proving an element of the offense, regardless of whether use of a firearm is an actual element of the offense, the firearm enhancement in G.S. 15A-1340.16A may not be used.

2. Manufacturing Methamphetamine

Step 5: Determine the Maximum Sentence.

No discretion in imposing maximum sentence *G.S. 15A-1340.17*

***State v. Parker*, 143 N.C. App. 680, 550 S.E.2d 174 (2001).** The trial court sentenced defendant to a minimum of 100 months and a maximum of 120 months. The sentence was later corrected by a subsequent trial court judge to a minimum of 100 months and a maximum of 129 months. Defendant argued on appeal that the original sentence was not error but was an exercise of discretion permitted by the Structured Sentencing Act. The Court of Appeals held that the Structured Sentencing Act limits judicial discretion to choosing the minimum sentence from within a specified range. *State v. Caldwell*, 125 N.C. App. 161, 479 S.E.2d 282 (1997). The language of the Act provides for no such discretion with regard to maximum sentences. Once a minimum sentence is determined, the "corresponding" maximum sentence is "specified" in a table set forth in G.S. 15A-1340.17.

A. Maximum Sentences for Class F through I Felonies

B. Maximum Sentences for Class B1 through E Felonies

Step 6: Determine the Sentence Disposition.

A. Sentence Dispositions on Felony Punishment Chart

B. Active Punishment

C. Intermediate Punishment

D. Community Punishment

E. Extraordinary Mitigation

"Normal" mitigating factors are insufficient "without additional facts"

***State v. Melvin*, 188 N.C. App. 827, 656 S.E.2d 701 (2008).** Defendant pled guilty to, *inter alia*, multiple Class C and D felonies. He asked the trial court to find twelve extraordinary mitigating factors and impose an intermediate punishment pursuant to G.S. 15A-1340.13(g)-(h). The court instead found six mitigating factors under G.S. 15A-1340.16(e) and sentenced defendant to two active sentences in the mitigated range. It explained that multiple mitigating factors did not "add up to one extraordinary mitigating factor" and expressed doubt that a statutory mitigating factor could ever constitute an extraordinary mitigating factor. The Court of Appeals found no abuse of the discretion by the trial court. It agreed that "[t]he sheer number of mitigating factors cannot in and of itself support a finding of extraordinary mitigation" under G.S. 15A-1340(g). As to whether a mitigating factor listed in G.S. 15A-1340.16(e) could qualify as an extraordinary mitigating factor, the Court of Appeals clarified that "the trial court is not precluded from making a finding of extraordinary mitigation based upon the same facts as would support one of the mitigating factors listed in the statute," provided that there are "additional facts present, over and above the facts required to support a normal statutory mitigation factor."

Use of extraordinary mitigation is limited to imposition of an intermediate punishment

***State v. Watkins*, 189 N.C. App. 784, 659 S.E.2d 58 (2008).** A trial court cannot use extraordinary mitigation as grounds to depart from the structured sentencing grid, or to run a sentence imposed for habitual felon status concurrent to defendant's existing federal sentence, in violation of G.S. 14- 7.6 ("Sentences imposed under this Article shall run consecutively with and shall commence at the expiration of any sentence being served . . . under this section.").

***State v. Messer*, 142 N.C. App. 515, 543 S.E.2d 195 (2001).** Pursuant to G.S. 15A-1340.13(h), a judge may not find extraordinary mitigation in cases where a defendant has more than five prior record points. Moreover, extraordinary mitigation allows only for a deviation from an active punishment otherwise required by the sentencing grid, not a deviation in sentence length.

Finding of extraordinary mitigation is discretionary

***State v. Ray*, 125 N.C. App. 721, 482 S.E.2d 755 (1997).** The trial court did not find extraordinary mitigation pursuant to G.S. 15A-1340.13(g) despite its finding no aggravating factors and four mitigating factors. The Court of Appeals held that the decision to impose an intermediate punishment by finding extraordinary mitigation is within the discretion of the trial court and that there was no abuse of discretion in this case.

F. Exception for Drug Trafficking Convictions

Substantial assistance finding is discretionary

***State v. Robinson*, 177 N.C. App. 225, 628 S.E.2d 252 (2006).** Defendant pled guilty to cocaine trafficking under a plea agreement providing that he would testify "truthfully [and] consistent" with his prior statements to law enforcement about his brother, and that the State stipulated such testimony would constitute "substantial assistance." The trial court continued defendant's sentencing, pending his testimony against his brother in a companion case. Prior to the brother's trial, defendant met with law enforcement and largely retracted his previous statements. The State did not call defendant as a witness at the brother's trial. At defendant's sentencing hearing, the State presented a letter from the U.S. Attorney in the brother's case making clear that defendant had not provided assistance. The trial court declined to find substantial assistance and imposed the mandatory sentence under G.S. 90-95(h)(3). The Court of Appeals found no abuse of discretion by the trial court. A finding of substantial assistance is wholly within the trial court's discretion. Moreover, even if substantial assistance is found, any sentencing reduction is within the court's discretion and not mandatory.

Sentencing after a finding of substantial assistance

***State v. Saunders*, 131 N.C. App. 551, 507 S.E.2d 911 (1998).** Once the trial court has made a finding of substantial assistance, it is not bound by the structured sentencing grid, but may impose any sentence in its discretion.

G. Fines

Step 6A: Impose an Active Punishment

A. Amount of Time to Be Served

Active sentence must be served continuously

***State v. Miller*, 205 N.C. App. 291, 695 S.E.2d 149 (2010).** Defendant's thirty-day sentence was activated upon revocation of probation. The trial court denied his request to serve his sentence two days per week over fifteen weeks. On appeal, defendant argued that the court failed to recognize its authority under Structured Sentencing to impose an active sentence of this nature. The Court of Appeals disagreed, finding "no provision of Article 81B that authorizes an active sentence of nonconsecutive days."

B. Earned Time

C. Multiple Convictions

1. Concurrent sentences

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2. Consecutive sentences

Court has discretion to impose consecutive sentences for felonies

***State v. Nunez*, 204 N.C. App. 164, 693 S.E.2d 223 (2010).** Defendant was convicted of two counts of trafficking in marijuana. Relying on the parties' assertion that consecutive sentences were required by G.S. 90-95(h)(6), the trial court imposed two consecutive sentences. The Court of Appeals remanded for resentencing. Although the trial court had the discretion to enter consecutive sentences under G.S. 15A-1354(a), it was not compelled to do so. Subsection 90-95(h)(6) requires only that a sentence for drug trafficking run consecutively to any sentence a defendant is *already* serving at the time of sentencing. The Court noted, "When a trial judge acts under a misapprehension of the law, this constitutes an abuse of discretion."

***State v. Hueto*, 195 N.C. App. 67, 671 S.E.2d 62 (2009).** Although the decision to impose concurrent or consecutive sentences is discretionary, the trial court may not impose consecutive sentences based on defendant's exercise of the right to a jury trial. Because the trial court's pre-trial statements supported a reasonable inference that it imposed consecutive sentences in part due to defendant's refusal to plead guilty, the Court of Appeals remanded for resentencing.

***State v. Love*, 131 N.C. App. 350, 507 S.E.2d 577 (1998), *aff'd per curiam*, 350 N.C. 586, 516 S.E.2d 382 (1999).** Defendant claimed on appeal that the trial court abused its discretion by imposing consecutive sentences, thereby subjecting him to cruel and unusual punishment.

He argued that the lack of statutory guidance as to when concurrent and consecutive sentences are appropriate leads to abuses of discretion. The Court of Appeals held that the trial court had the authority to impose consecutive sentences, and that the lack of statutory guidelines for imposing consecutive sentences is an issue for the legislature.

Sentences are presumptively concurrent, unless specified *G.S. 15A-1354(a)*

***State v. Crumbley*, 135 N.C. App. 59, 519 S.E.2d 94 (1999).** At the time of sentencing, the trial court did not indicate whether the sentences imposed were to run consecutively or concurrently. The trial court subsequently entered written judgments with consecutive sentences. The Court of Appeals vacated and remanded "for the entry of a new sentencing judgment." The written judgment controls over a sentence announced in open court. However, because the trial judge failed to announce consecutive sentences in court, the effect was to impose concurrent sentences under G.S. 15A-1354(a). Therefore, the judge erred by altering the sentences to run consecutively outside of defendant's presence and without providing him an opportunity to be heard.

Consecutive sentences and the Eighth Amendment

***State v. Parker*, 137 N.C. App. 590, 530 S.E.2d 297 (2000).** The trial court found defendant guilty of trafficking in cocaine by transportation and conspiracy to traffic in cocaine and imposed consecutive sentences. On appeal, defendant argued that the imposition of consecutive terms violated the United States and North Carolina constitutional prohibitions against cruel and unusual punishment because her sentence was disproportionate to the crimes. Specifically, defendant noted that her more culpable co-conspirators received lesser or equivalent sentences. The Court of Appeals found no error. Citing *State v. Green*, 348 N.C. 588, 502 S.E.2d 819 (1998), it held that the prohibition against cruel and unusual punishment does not require strict proportionality between the crime and the sentence but forbids only extreme sentences that are 'grossly disproportionate' to the crime.

Consecutive sentences and double jeopardy

***State v. Rich*, 130 N.C. App. 113, 502 S.E.2d 49 (1998).** The trial court ordered that defendant's sentences for first-degree burglary and common law robbery run consecutively. In affirming the trial court, the Court of Appeals held that where the offenses for which defendant is sentenced are two distinct criminal offenses which require proof of different elements, there is no requirement that the sentences be merged. Accordingly, defendant's consecutive sentences did not violate the constitutional prohibition against double jeopardy.

3. Consolidated offenses

Resentencing is required after vacating any consolidated offense

***State v. Toney*, 187 N.C. App. 465, 653 S.E.2d 187 (2007).** Defendant was convicted of five offenses, including felony possession with intent to sell or deliver marijuana and misdemeanor maintaining a dwelling for the purpose of keeping or selling controlled substances. The trial court consolidated the offenses for judgment and sentenced defendant for the felony. The Court of Appeals reversed the misdemeanor conviction for maintaining a dwelling but affirmed the remaining convictions. Relying on *State v. Brown*, 350 N.C. 193, 513 S.E.2d 57 (1999), the

Court of Appeals remanded for resentencing. Although defendant was sentenced for the most serious of the consolidated offenses, the reviewing court could not assume that the vacated misdemeanor conviction had no affect on the sentencing decision.

***But see State v. Curry*, 203 N.C. App. 375, 692 S.E.2d 129 (2010).** Because felony murder carries a mandatory life sentence, it is unnecessary to remand if a consolidated conviction is overturned on appeal. Quoting *State v. Goldston*, 343 N.C. 501, 471 S.E.2d 412 (1996), the Court of Appeals arrested judgment on the consolidated conviction for robbery with a dangerous weapon (which merged into the felony murder conviction) in lieu of remand.

***But cf. State v. Dobbs*, 208 N.C. App. 272, 702 S.E.2d 349 (2010).** The trial court consolidated defendant's convictions for trafficking in opium and sale or delivery of a Schedule III controlled substance. The judgment erroneously identified sale or delivery of a Schedule III controlled substance as a Class G felony, rather than a Class H felony. However, because defendant was sentenced for the trafficking offense, and because the sentence for drug trafficking is prescribed by statute, the Court of Appeals found it unnecessary to order a new sentencing hearing. It remanded solely for correction of the "clerical error" in the judgment.

Consolidating offenses is discretionary

***State v. Hueto*, 195 N.C. App. 67, 671 S.E.2d 62 (2009).** Although the decision to consolidate offenses for judgment is discretionary, the trial court may not base its decision to impose separate sentences on defendant's exercise of the right to a jury trial. Because the pre-trial trial court's pretrial statements supported a reasonable inference that its decision to impose eight consecutive sentences was based in part on defendant's decision to proceed to trial in lieu of pleading guilty, the Court of Appeals remanded for a new sentencing hearing. *See also State v. Haymond*, 203 N.C. App. 151, 691 S.E.2d 108 (2010) (remanding for resentencing where, "as in *Hueto*, we believe it may be reasonably inferred from the trial court's statements that it made this decision [*i.e.*, to impose ten consecutive habitual felon sentences in lieu of consolidating any of defendant's convictions] based at least in part on defendant's decision to refuse the State's plea").

***State v. Moffitt*, 185 N.C. App. 308, 648 S.E.2d 272 (2007).** Defendant originally received a sentence of 34 to 50 months for conspiracy, and a consecutive sentence of 145 to 183 months for consolidated offenses of two counts of first-degree kidnapping, two counts of armed robbery and one count of breaking or entering. On remand, the trial judge consolidated the offenses differently, sentencing defendant to 70 to 93 months for the two kidnappings and a consecutive term of 61 to 83 months for the remaining charges. The Court of Appeals rejected defendant's claim that he was sentenced more severely on remand in violation of G.S. 15A-1335. Defendant's initial sentences totaled 179 to 233 months. His sentences on remand totaled only 131 months to 176 months. Quoting *State v. Ransom*, 80 N.C. App. 711, 343 S.E.2d 232 (1986), the Court noted that "nothing [in G.S. 15A-1335] prohibits the trial court from changing the way in which it consolidated convictions" in a prior sentencing proceeding.

Offenses governed by different sentencing laws cannot be consolidated

***State v. Branch*, 134 N.C. App. 637, 518 S.E.2d 213 (1999).** Defendant was convicted of two counts of breaking and entering and larceny committed on September 19, 1994 and October 4, 1994. The trial court consolidated the offenses and sentenced him under Structured

Sentencing to a prison term of twelve to fifteen months. The Department of Correction sent the judgment back indicating that offenses governed by the Fair Sentencing Act could not be combined for sentencing with offenses governed by Structured Sentencing. At resentencing, defendant received twelve to fifteen months for the October 4 offenses and ten years for the September 19 offenses. On appeal, defendant argued that there was no bar to consolidating the offenses, and that the new sentencing hearing was unlawful. The Court of Appeals found no error. Offenses may not be consolidated for judgment if they are subject to different sentencing laws. Moreover, the trial court was authorized to resentence defendant pursuant to G.S. 15A-1415(b)(8), because his original sentence was unlawful at the time imposed.

Prior record level is based on the most serious of the consolidated offenses

***State v. Gardner*, __ N.C. App. __, __ S.E.2d __ (Jan. 15, 2013).** Defendant pled guilty to the Class H felony of speeding to elude arrest, the Class F felony of assault with a deadly weapon on a government officer (AWDWOGO), and habitual felon status. Because defendant had a prior conviction for speeding to elude arrest, he had a Prior Record Level IV for this offense, but a level III for AWDWOGO. *See* G.S. 15A-1340.14(b)(6). The trial court consolidated the offenses and sentenced defendant as an habitual felon with a Prior Record Level IV. The Court of Appeals remanded for resentencing. Even though defendant's habitual felon status required that he be sentenced as a Class C felon for either of his substantive felonies, G.S. 14-7.6, the trial court must calculate his prior record level based on "the most serious offense" in the consolidated judgment – *i.e.*, the Class F felony. G.S. 15A-1340.15(b). Note: Although not applicable in *Gardner*, for offenses committed on or after December 1, 2011, the Justice Reinvestment Act of 2011 amended G.S. 14-7.6 so that a defendant's habitual felon status results in a four-class enhancement of the sentencing offense, not to exceed Class C.

D. Post-Release Supervision

E. Minimum and Maximum Sentences for Drug Trafficking

Step 6B: Impose an Intermediate Punishment

For cases pertaining to probation, see **F. Community Punishments***, below.*

A. Imposing a Term of Supervised Probation

Non-presumptive probation term requires findings of fact *G.S. 15A-1343.2(d)*

***State v. Riley*, 202 N.C. App. 229, 688 S.E.2d 477 (2010).** Defendant was convicted of a felony and received an intermediate punishment that included 60 months of supervised probation. Because the trial court made no findings under G.S. 15A-1343.2(d)(4) that a period of probation longer than 36 months was necessary, the Court of Appeals remanded for resentencing on the length of probation. The trial court was free on remand to "consider whether a term of probation of greater than 36 months is appropriate."

Conditions of probation

***State v. Payne*, 156 N.C. App. 687, 577 S.E.2d 166 (2003).** The trial court suspended defendant's prison sentence and placed him on supervised probation for 36 months and imposed 90 days active time in county jail as a condition of special probation under G.S. 15A-1351(a). While in jail, defendant was charged with violating the regular condition of probation that he obey Department of Correction (DOC) rules during any period of active time served as a condition of special probation. G.S. 15A-1343(b). Based on this violation, the trial court revoked probation and activated defendant's sentence. The Court of Appeals affirmed. A defendant who is serving active time as a condition of special probation is subject to the rules and regulations of the DOC as a regular condition of probation, even when held in a county jail rather than a DOC facility.

B. Selecting Intermediate Punishment/Setting Lengths

Special probation limited to one-fourth of maximum sentence *G.S. 15A-1351(a)*

***State v. Riley*, 202 N.C. App. 229, 688 S.E.2d 477 (2010).** The trial court sentenced defendant to a suspended prison term of 46 to 65 months, with 30 months of special probation. The Court of Appeals remanded for resentencing. Because "the total of all periods of confinement imposed as an incident of special probation . . . may not exceed one-fourth the maximum sentence of imprisonment imposed for the offense," G.S. § 15A-1351(a), defendant was subject to a maximum of 16.25 months of special probation.

Credit against sentence for prior confinement *G.S. 15-196.1*

***State v. Lutz*, 177 N.C. App. 140, 628 S.E.2d 34 (2006).** As a condition of probation, defendant was required to attend the Department of Correction's DART-Cherry substance abuse program. He later violated probation, and his sentences were activated. The Court of Appeals held that defendant was entitled to credit against his sentence under G.S. 15-196.1 for the days he spent in DART-Cherry, because he was in custody and not at liberty as the result of the charge.

***State v. Hearst*, 356 N.C. 132, 567 S.E.2d 124 (2002).** Defendant participated in the IMPACT program for 81 days before violating the conditions of his probation. The trial judge activated his sentence but denied him credit against his sentence for the time spent in IMPACT. The Supreme Court held that defendant should be given credit for his time at IMPACT. The decision to attend IMPACT was not voluntary; the conditions of IMPACT resemble imprisonment; and trainees have no control over any daily activities while at IMPACT.

***State v. Jarman*, 140 N.C. App. 198, 535 S.E.2d 875 (2000).** Defendant's pretrial bond was reduced on condition that she be placed under house arrest with electronic surveillance. Defendant pled guilty to eight counts of embezzlement and was sentenced to an active term for five counts (under Structured Sentencing) and supervised probation for the remaining three counts (under Fair Sentencing). Pursuant to G.S. 15-196.1, she was credited with the time she spent in custody awaiting trial, including her period of house arrest. The State filed a "Motion to Correct Judgment," challenging the credit awarded for the period of house arrest with electronic monitoring. The trial court amended the judgment and awarded credit only for the time defendant spent in jail. The Court of Appeals affirmed the trial court and held that house arrest, whether with or without electronic monitoring, in defendant's own home while awaiting trial is not confinement

in a state or local institution and does not qualify as time credited against defendant's sentence pursuant to G.S. 15-196.1. The Court further held that pretrial house arrest was a proper regulatory restraint to ensure defendant's presence at the trial and disable her from committing other offenses. Because it was not punishment, defendant was not subject to double jeopardy.

C. Intermediate Conditions

Step 6C: Impose an Intermediate Punishment

A. Selecting the Community Punishment

Restitution is for harm "directly and proximately" caused by the offense G.S. 15A-1340.34

***State v. Best*, 196 N.C. App. 220, 674 S.E.2d 467 (2009).** The Court of Appeals vacated a restitution award against a defendant convicted of accessory after the fact to first degree murder. In order to support restitution, a defendant's offense must have "directly and proximately harmed" the victim. G.S. 15A-1340.34. When a defendant is an accessory after the fact to murder, the direct causal link is the obstruction of the police investigation, or the covering up of evidence. Here, the evidence showed that defendant washed the exterior and vacuumed the interior of his car and unsuccessfully tried to pick up the principals at a motel the day after the murders. He voluntarily went to the police station several days later and gave a statement implicating the principals. The Court of Appeals found no evidence that defendant's actions hindered the investigation or assisted the principals in evading prosecution. There was thus no "direct and proximate" causal link between defendant's crime and the harm to the victims' families.

Restitution amount must be supported by evidence; findings not required

***State v. Wright*, __ N.C. App. __, 711 S.E.2d 797 (2011).** "[A]n award from the [North Carolina] Crime Victims Compensation Commission constitutes sufficient evidence to support an order of restitution."

***State v. Davis*, 206 N.C. App. 545, 696 S.E.2d 917 (2010).** Defendant pled guilty to multiple offenses, including financial card theft, financial card fraud, burglary, larceny, and armed robbery. The court ordered her to pay $2,539.06 in restitution to seven victims. Although defendant did not object to the restitution imposed, the Court of Appeals vacated the restitution orders and remanded for a new hearing on the ground that the State adduced no evidence to support the amounts reflected on the restitution worksheets. The Court rejected the State's argument on appeal that defendant stipulated to the restitution amounts by stipulating to the factual basis for her guilty plea.

***State v. Riley*, 167 N.C. App. 346, 605 S.E.2d 212 (2004).** Defendant pled guilty to six counts of embezzlement, with consecutive sentences suspended for 60 months of supervised probation. The trial court ordered $78,081 in restitution. The Court of Appeals found no error. Although a restitution order must be supported by some evidence, the trial court need not make specific findings in support of the award. Because the trial court heard evidence that the total damages

were $108,081 and that the victim had received $30,000 in insurance proceeds, there was sufficient evidence to support the restitution award.

***State v. Shelton*, 167 N.C. App. 225, 605 S.E.2d 228 (2004) (citing *State v. Buchanan*, 108 N.C. App. 338, 423 S.E. 2d 819 (1992).** An "unsworn statement of the prosecutor is insufficient to support" a restitution award.

Court must consider defendant's ability to make restitution *G.S. 15A01340.36*

***State v. Riley*, 167 N.C. App. 346, 605 S.E.2d 212 (2004).** Defendant pled guilty to six counts of embezzlement, with consecutive sentences suspended for 60 months of supervised probation. The trial court ordered $78,081 in restitution to be paid in monthly installments exceeding $1,300. Defendant presented evidence that her monthly net income was roughly $1,400, and that her monthly expenses totaled over $2,100. The record contained evidence that defendant's husband had an income from his business, but was silent as to his contribution to the family expenses. Defendant appealed the restitution order, arguing that the trial court erred by failing to consider her ability to pay in setting the restitution amount. The Court of Appeals found no error. Defendant's net income was sufficient to cover the monthly restitution payments. By failing to offer evidence as to her husband's income or his contribution to their monthly expenses, she failed to demonstrate that her available resources would be insufficient.

***State v. Mucci*, 163 N.C. App. 615 , 594 S.E.2d 411 (2004).** Defendant was sentenced to community punishments upon his conviction for feloniously issuing worthless checks. As conditions of his probation, he was ordered to complete 25 hours of community service per week and to pay $26,239.30 in restitution. The Court of Appeals remanded for resentencing. Under G.S. 15A-1340.36 and 15A-1343(d), the trial court should have considered such factors as defendant's ability to be gainfully employed and earn enough money to both pay restitution and support his family. Moreover, "the trial court also failed to consider defendant's ability to comply with both [probation] conditions simultaneously, as well as meeting his other obligations under the sentence of paying costs and fines."

Restitution not allowed for pain and suffering

***State v. Wilson*, 158 N.C. App. 235, 580 S.E.2d 386 (2003).** Defendant was convicted of common law robbery and ordered to pay $500 in restitution, $480 of which was for pain and suffering. The Court of Appeals remanded for reduction of the restitution award to $20, holding that restitution cannot include pain and suffering damages. Read together, G.S. 15A-1340.34(b) and 15A-1340.35 clearly limit restitution to tangible costs, income, and values. Pain and suffering, which normally must be determined by a jury, are neither tangible nor easily quantified.

B. Imposing a Term of Probation

Non-presumptive probation term requires findings of fact *G.S. 15A-1343.2(d)*

***State v. Branch*, 194 N.C. App. 173, 669 S.E.2d 18 (2008).** Defendant entered guilty pleas to two misdemeanors and received a community punishment that included 24 months of supervised probation. Under G.S. 15A-1343.2(d)(1), the maximum period of probation that may be imposed with a community punishment for a misdemeanor is 18 months, absent a finding by the court that a longer period of probation is necessary. Because the trial court failed to make the requisite

finding to support defendant's 24-month probation term, the Court of Appeals remanded "for resentencing or for entry of findings of fact as to why a longer probationary period is necessary."

Consecutive probation terms not allowed; consecutive suspended sentences allowed

***State v. Cousar*, 190 N.C. App. 750, 660 S.E.2d 902 (2008).** While agreeing with defendant's assertion that a court may not impose consecutive periods of probation, the Court of Appeals found no language in defendant's judgments indicating consecutive probation terms. Rather, the judgments ordered defendant's two suspended prison sentences to run consecutively, which was entirely proper. The Court rejected defendant's claim of error under *State v. Canady*, 153 N.C. App. 455, 570 S.E.2d 262 (2002), explaining that "[o]ur holding in Canady dealt only with consecutive periods of probation, not consecutive sentences that were suspended." Pursuant to G.S. 15A-1346, defendant's periods of probation were concurrent.

***State v. Canady*, 153 N.C. App. 455, 570 S.E.2d 262 (2002).** The trial court consolidated two of four offenses for judgment and sentenced defendant to: (1) active imprisonment, (2) a suspended sentence with supervised probation, and (3) another suspended sentence with supervised probation, to run consecutively with the first period of probation. The Court of Appeals held that, under the plain terms of G.S. 15A-1346, any sentence of probation must run concurrently with any other term of probation imposed.

Appeal from district to superior court stays the probation term

***State v. Smith*, 359 N.C. 618, 614 S.E.2d 279 (2005).** On 6 December 2000, the District Court placed defendant on 12 months supervised probation for a misdemeanor conviction. He appealed to Superior Court but withdrew his appeal on 29 January 2001. On 24 January 2002, defendant's probation officer filed a violation report. The District Court dismissed the probation violation on the ground that the State failed to file the report before the expiration of the probation period. On appeal, the Superior Court found the violation report to be timely, because defendant's probation had been stayed while his appeal was pending. The Supreme Court agreed. Under G.S. 15A-1431(e) a defendant remains on pretrial release during an appeal from district to superior court, unless the court orders otherwise. Noting "the logical impossibility of a defendant being simultaneously on pretrial release and on probation for the same offense[,]" the Supreme Court held defendant's "probation did not begin until his case was remanded to the district court for execution of the judgment and did not expire until one year after that date."

Modifying or revoking probation after expiration of the probation term *G.S. 15A-1344(f)*

***State v. Hicks*, 148 N.C. App. 203, 557 S.E.2d 594 (2001).** The trial court suspended defendant's prison sentence and placed him on supervised probation for a term ending no August 18, 1999. Defendant's probation officer signed and dated a Violation Report on July 23, 1999. However, the Violation Report and Order for Arrest were not filed until September 18, 2000, thirteen months after defendant's probation had expired. The trial court held a revocation hearing and activated defendant's sentence. The Court of Appeals found that the trial court lacked jurisdiction over defendant. To preserve the court's jurisdiction beyond the probation term, G.S. 15A-1344(f)(1) "requires the State to '[file] a written motion with the clerk indicating [the State's] intent to conduct a revocation hearing' before the period of probation expires." Because the Violation Report was not timely filed, the judgment was arrested and defendant discharged.

SECTION II: ADDITIONAL SENTENCING PROVISIONS RELATING TO FELONIES

A. Life Without Parole

Constitutionality of life-without-parole sentence

***State v. Taylor*, 178 N.C. App. 395, 632 S.E.2d 218 (2006).** Defendant was sentenced to life without parole for first-degree felony murder. He challenged his sentence as cruel and unusual under the Eighth Amendment, on the grounds that he "(1) was not proven to be the shooter; (2) was [16] years old at the time the victim was shot; and, (3) had no prior record." The Court of Appeals affirmed. The evidence showed that the victim drowned after being shot, and that defendant assisted in pushing him into a river. The Court also cited *State v. Lee*, 148 N.C. App. 518, 558 S.E.2d 883 (2002), in which a similar sentence was upheld for an offense committed by a 14-year-old.

***State v. Hightower*, 168 N.C. App. 661, 1 Mar 2005 (2005).** Proportionality review does not apply to a non-capital sentence of life without parole imposed for first-degree felony murder.

***State v. Allen*, 346 N.C. 731, 488 S.E.2d 188 (1997).** The Supreme Court rejected defendant's claim that his sentence of life imprisonment without parole for murder violates the North Carolina Constitution's Separation of Powers Clause and other provisions, and is not a punishment recognized by the state constitution. In determining that life without parole does not offend the separation of powers, the Supreme Court noted that the Governor has no constitutional power to parole, and that the Governor's constitutional clemency power remains intact. The constitution vests the General Assembly with the power to prescribe the maximum and minimum punishments which can be imposed. Moreover, imprisonment is a valid form of punishment under N.C. Const. art. XI, § 1.

B. Second or Subsequent Conviction for a Class B1 Felony

C. Egregious Aggravation for Certain Class B1 Felony Sex Offenses Against Children

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D. Violent Habitual Felons

***State v. Safrit*, 145 N.C. App. 541, 551 S.E.2d 516 (2001).** Defendant was found guilty of assault with a deadly weapon inflicting serious injury and violent habitual felon status. He appealed his conviction of being a violent habitual felon, on the ground that he had previously been found not guilty of violent habitual felon status under an indictment alleging the same two prior convictions. The Court of Appeals agreed. If a defendant is acquitted of violent habitual felon status, the State is collaterally estopped to indict defendant again as a violent habitual felon

based on the same two prior violent felony convictions.

***State v. Mason*, 126 N.C. App. 318, 484 S.E.2d 818 (1997).** The trial court sentenced defendant to life without parole based on his status as a violent habitual felon. Defendant challenged the constitutionality of the violent habitual felon law, arguing that it violated the right to due process and equal protection, that it constituted an *ex post facto* punishment and placed him in double jeopardy, and that it imposed cruel and unusual punishment. Relying on State v. Todd, 313 N.C. 110, 326 S.E.2d 249 (1985), the Court held that the violent habitual felon law is constitutional. Defendant also argued that his previous conviction of assault with a deadly weapon inflicting serious injury was a Class H felony and his prior conviction for voluntary manslaughter was a Class F felony at the time he committed those offenses, and that to subsequently treat these offenses as Class E felonies to establish the violent habitual felon status violated his protection against *ex post facto* laws. The Court of Appeals disagreed. The Structured Sentencing Act superceded the former statutes governing defendant's prior offenses. Moreover, because the Violent Habitual Felons Act enhances the punishment for defendant's instant offense, rather than retroactively increasing the punishment for the prior convictions, it is not an *ex post facto* law.

E. Habitual Felons

Habitual felon status is not a substantive offense

***State v. Wilson*, 139 N.C. App. 544, 533 S.E.2d 865 (2000).** Defendant was convicted of two felony offenses and habitual felon status. The trial court consolidated the substantive felonies for judgment and imposed an active prison sentence of six to eight months. In a separate judgment, the court sentenced defendant for habitual felon status to a consecutive active term of 133 to 169 months. Because habitual felon status is not a substantive offense, the Court of Appeals vacated defendant's sentences, instructing the trial court as follows: "Upon remand, the court shall calculate defendant's proper prior record level pursuant to [G.S.] 15A-1340.14 (1999) and shall impose sentences upon the "the underlying felonies as . . . Class C felonies[.]"

Sentencing as habitual felon is mandatory following conviction or admission

***State v. Wells*, 196 N.C. App. 498, 675 S.E.2d 85 (2009).** The jury found defendant guilty of the Class C felony of assault with a deadly weapon with intent to kill inflicting serious injury. Defendant then pled guilty to habitual felon status. The trial court sentenced defendant for the assault offense and included in his prior record level calculation the convictions alleged in the habitual felon indictment. The Court of Appeals remanded for resentencing. Under G.S. 14-7.2 and 14-7.6, the trial court was required to sentence defendant as an habitual felon once he had entered his guilty plea. G.S. 14-7.5. Excluding the convictions in the habitual felon indictment, as required by G.S. 14-7.6, would have reduced defendant's prior record level.

Habitual felon charge may be withdrawn prior to jury verdict

***State v. Murphy*, 193 N.C. App. 236, 666 S.E.2d 880 (2008)** The State indicted defendant for robbery with a dangerous weapon, attempted robbery with a dangerous weapon, possession of a firearm by a felon, and habitual felon status. During jury deliberations on the substantive charges, the prosecutor advised the court that the State would only pursue habitual felon status as to the possession of a firearm charge. The jury found defendant guilty of the substantive

offenses. It then found him to be an habitual felon. The trial court sentenced defendant as an habitual felon for possession of a firearm by a felon, excluding the convictions alleged in the habitual felon indictment from his prior record level in accordance with G.S. 14-7.6. Because the State had withdrawn the habitual felon charge as to the two robberies, the court used the convictions in the habitual felon indictment to calculate defendant's prior record level for these offenses. On appeal, defendant claimed that G.S. 14-7.2 and 14-7.6 required the trial court to sentence him as an habitual felon for each of his offenses, once the jury had convicted him of the status. Finding no error, the Court of Appeals held that "the District Attorney has the authority and discretion to withdraw an habitual felon indictment as to some or all of the underlying felony charges pending against a defendant, up until the time that the jury returns a verdict of guilty that defendant had attained the status of an habitual felon."

Habitual felon sentence must be consecutive to any sentence being served *G.S. 14-7.6*

***State v. Watkins*, 189 N.C. App. 784, 659 S.E.2d 58 (2008).** Under G.S. 14-7.6, a sentence under the Habitual Felons Act must "run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced under this section." Even a finding of extraordinary mitigation under G.S. 15A-1340.13 will not allow a sentencing court to depart from the mandatory provisions of G.S. 14-7.6. Therefore, the trial court erred by running defendant's habitual felon sentence concurrent to his existing federal sentence.

Habitual felon indictments *G.S. 14-7.3*

***State v. Bradley*, 175 N.C. App. 234, 623 S.E.2d 85 (2005).** Defendant was indicted for and pled guilty to a substantive felony and habitual felon status. Sentencing was continued. Defendant was then arrested and charged with a new felony. Before being sentenced for the first guilty plea, he entered a guilty plea to the new felony, admitted his habitual felon status in the transcript of plea, and was sentenced as an habitual felon. The Court of Appeals reversed defendant's sentence, because the State had not charged him with habitual felon status in an indictment ancillary to the second felony charge, as required by G.S. 14-7.3. Defendant's first guilty plea constituted a "conviction" for the first felony offense. Therefore, the subsequent felony charge was a separate proceeding and required a new habitual felon indictment.

***State v. Marshburn*, 173 N.C. App. 749, 620 S.E.2d 282 (2005).** Defendant was charged with possession of cocaine as an habitual felon. After the jury returned a guilty verdict on the possession charge, but before proceeding to the habitual felon stage, the trial court dismissed the habitual felon indictment *ex mero motu* for lack of an arraignment "before the close of the State's case" as required by G.S. 15A-928(c). The Court of Appeals reversed, holding that habitual felon indictments are governed by G.S. 14-7.3, not G.S. 15A-928, and are addressed in a separate proceeding after conviction for the underlying felony. The Court rejected defendant's argument that reviving the habitual felon indictment would subject him to double jeopardy. A recidivism-based sentencing enhancement is not "new jeopardy" but a "stiffened penalty for the latest crime."

***State v. Murray*, 154 N.C. App. 631, 572 S.E.2d 845 (2002).** Defendant was indicted for felonious larceny of a motor vehicle and for habitual felon status. He was subsequently indicted for possessing the stolen vehicle. Defendant was convicted of possessing the stolen vehicle and habitual felon status. On appeal, he argued that the habitual felon indictment was not ancillary to any predicate felony as required in *State v. Allen*, 292 N.C. 431, 233 S.E.2d 585 (1977),

because the habitual felon indictment predated the indictment for the substantive felony for which he was convicted. The Court of Appeals found no error. There was a pending prosecution for a substantive felony at the time defendant was indicted as an habitual felon, even though he was indicted for the felony of conviction after the date of the habitual felon indictment. "In fact, defendant was tried at the same session of criminal court by the same jury on the predicate felonious possession of stolen goods charge and then on the habitual felon charge."

***State v. Cheek*, 339 N.C. 725, 453 S.E.2d 862 (1995).** The Supreme Court held that G.S. 14-7.3 does not require the habitual felon indictment to allege a specific predicate felony. It need only allege the three prior felony convictions that support the habitual felon charge.

Habitual felon status and drug trafficking

***State v. Eaton*, __ N.C. App. __, 707 S.E.2d 642 (2011).** Notwithstanding the mandatory sentences prescribed for drug trafficking in G.S. 90-95(h), the Court of Appeals held a defendant convicted of opiate trafficking under G.S. 90-95(h)(4)(a) and of attaining habitual felon status was subject to sentencing as a Class C habitual felon under G.S. 14-7.6. The Court read the drug trafficking statute and the Habitual Felons Act to "complement each other and address different means of enhancing punishment." It noted the 'absurd[ity]" of a contrary interpretation, under which a person convicted of mere possession of a controlled substance as an habitual felon would be sentenced as a Class C felon under G.S. 14-7.6, while a person convicted of trafficking the same drug as an habitual felon would be exempt from the enhancement.

Habitual felon status and the Eighth Amendment

***State v. Hall*, 174 N.C. App. 353, 620 S.E.2d 723 (2005).** Defendant was convicted by jury of obtaining property by false pretenses. He then admitted his habitual felon status and was sentenced as a Class C felon with a Prior Record Level V, based on convictions including 7 felonies and 11 misdemeanors. The Court of Appeals upheld the sentence, finding no merit to defendant's claim that the use of prior misdemeanor convictions to enhance his already-enhanced habitual felon sentence violated the Eighth Amendment bar on cruel and unusual punishment.

***State v. Hensley*, 156 N.C. App. 634, 577 S.E.2d 417 (2003).** Defendant was found guilty of obtaining property by false pretenses as an habitual felon. He challenged his habitual felon conviction under the Eight Amendment on the grounds that reliance upon a 19-year-old conviction was cruel and unusual punishment and that his sentence was so disproportionate to his offense as to amount to cruel and unusual punishment. The Court of Appeals affirmed, holding that (1) nothing in G.S. 14-7.4 places a time limit on the use of prior felony convictions to confer habitual felon status, and (2) the sentence imposed was not disproportionate, because it was based on defendant's recidivistic behavior over a number of years, not just the current offense.

Habitual felon status and due process/equal protection

***State v. Parks*, 146 N.C. App. 568, 553 S.E.2d 695 (2001).** Defendant was found guilty of two substantive felonies and pled guilty to habitual felon status. He argued on appeal that his habitual felon indictment violated the Equal Protection Clause, because his local district attorney had a policy of prosecuting all persons eligible for habitual felon status while other districts may

not have that policy. Defendant also argued that the Habitual Felons Act was repealed by the Structured Sentencing Act due to the "irreconcilable conflict" between the two Acts. The Court of Appeals found no equal protection violation based simply on the non-uniform prosecution of habitual felons by local district attorneys. Selective prosecution violates the Constitution only when deliberately based upon race, religion or other arbitrary classifications. The Court further held that the Structured Sentencing Act is different from the Habitual Felons Act but not in conflict. Structured Sentencing applies to all people committing misdemeanors or felonies and enhances their sentence based on their prior record. The Habitual Felons Act applies only to a defendant who has committed three prior non-overlapping felonies and raises his offense level within Structured Sentencing for the fourth felony conviction. Moreover, the General Assembly's amendment of the Habitual Felons Act subsequent to its enactment of Structured Sentencing refutes the suggestion of an implicit repeal.

Habitual felon status and double jeopardy

***State v. Brown*, 146 N.C. App. 299, 552 S.E.2d 234 (2001).** Defendant pled guilty to possession with intent to sell and deliver marijuana and to being an habitual felon. Defendant argued on appeal that the use of the Habitual Felons Act in conjunction with the Structured Sentencing Act violated state and federal constitutional protections against double jeopardy. The Court of Appeals found no double jeopardy violation. It noted that G.S. 14-7.6 expressly bars the double-counting of a prior conviction to both increase a defendant's prior record level and confer habitual felon status. Moreover, neither Structured Sentencing nor the Habitual Felons Act imposes a second punishment for a prior conviction. Both laws enhance the punishment for the current offense based on defendant's status as a recidivist.

Habitual felon status and separation of powers

***State v. Wilson*, 139 N.C. App. 544, 533 S.E.2d 865 (2000).** The Court of Appeals rejected defendant's claim that the prosecutor's "unfettered discretion" under the Habitual Felons Act violates Article I, Section 6, of the North Carolina Constitution (separation of powers). The Court noted that N.C. Const. art. IV, sec. 18 vests the state's elected district attorneys with the sole constitutional authority to prosecute crimes. Absent a showing that the "prosecutorial system was motivated by a discriminatory purpose and had a discriminatory effect[,]" defendant failed to establish a constitutional violation.

Habitual felon status and the rule of lenity

***State v. Brown*, 146 N.C. App. 590, 553 S.E.2d 428 (2001).** Defendant argued on appeal that the Habitual Felons Act was ambiguous as to when a person becomes an habitual felon, and consequently, the rule of lenity requires that his habitual felon indictment be dismissed. The Court of Appeals held that the statute is clear and, therefore, the rule of lenity does not apply. A defendant becomes an habitual felon when he is convicted of the third qualifying felony. The requirement that a jury convict a defendant of being an habitual felon safeguards defendant's rights in that the State must prove to the satisfaction of a jury that defendant has in fact been convicted of three qualifying felonies.

Collateral attack of prior convictions not permitted

***State v. Flemming*, 171 N.C. App. 413, 615 S.E.2d 310 (2005) (citing *State v. Creason*, 123**

N.C. App. 495, 473 S.E. 2d 771 (1996), *affirmed per curiam*, 346 N.C. 165, 484 S.E.2d 525 (1997)). Defendant was convicted as an habitual felon. One of the three prior felonies alleged in the indictment was a plea in district court to possession with intent to sell or deliver cocaine. Defendant argued on appeal that the State failed to prove the district court's jurisdiction to enter a felony conviction. The Court of Appeals held that a defendant may not use an habitual felon proceeding to collaterally attack his prior convictions.

***State v. Hensley*, 156 N.C. App. 634, 577 S.E.2d 417 (2003).** Defendant was found guilty of obtaining property by false pretenses as an habitual felon. On appeal, he challenged his habitual felon conviction on the ground that a 1982 conviction should have been suppressed pursuant to G.S. 15A-980, because he had not been represented by counsel at trial. The Court of Appeals found that defendant's actual claim was for ineffective assistance of counsel, rather than failure to appoint counsel, and thus could not be used to collaterally attack the prior conviction.

Prior convictions as predicates for habitual felon status

***State v. Shaw*, __ N.C. App. __, __ S.E.2d __ (Dec. 4, 2012).** Defendant was convicted of uttering a forged instrument and habitual felon status. One of the predicate felonies alleged in the habitual felon indictment was a 2003 conviction for habitual misdemeanor assault. The Court of Appeals vacated defendant's sentence and remanded, noting that G.S. 14-33.2 "specifically provides that '[a] conviction under this section shall not be used as a prior conviction for any other habitual offense statute.'" The Court distinguished its holding in State v. Smith, 139 N.C. App. 209, 533 S.E.2d 518 (2000), that habitual misdemeanor assault is a substantive felony offense that may, itself, be enhanced by a defendant's habitual felon status.

***State v. Brewington*, 170 N.C. App. 264, 612 S.E.2d 648 (2005).** One of the felonies used to establish defendant's habitual felon status was a federal conviction for unarmed bank robbery as a youthful offender. The federal statutes provided for an unconditional discharge and set aside of the conviction six years after conviction (which had long since passed). In light of this unconditional discharge provision, defendant challenged the robbery conviction's validity as a "final judgment" for purposes of the Habitual Felons Act. The Court of Appeals held that, under G.S. 14-7.1, the unconditional discharge was merely a feature of the sentence imposed which did not affect the fact of conviction. Moreover, notwithstanding the federal statute's automatic discharge provision, defendant "did not present any evidence proving with any certainty that the conviction had been set aside" as required by G.S. 14-7.1.

***State v. Jones*, 358 N.C. 473, 598 S.E.2d 125 (2004).** Possession of cocaine is a felony under G.S. 90-95(d)(2) and can thus serve as an predicate felony in an habitual felon indictment.

***State v. Scott*, 167 N.C. App. 783, 607 S.E.2d 10 (2005).** Speeding to elude arrest with two aggravating factors under G.S. 20-141.5 is a substantive felony and may be used to confer habitual felon status.

***State v. Fulp*, 355 N.C. 171, 558 S.E.2d 156 (2002).** Defendant was indicted for felonious possession of stolen goods as an habitual felon. He moved to suppress one of the convictions alleged in the habitual felon indictment pursuant to G.S. 15A-980, arguing that a 1993 conviction was obtained in violation of his right to counsel. After a hearing, the trial court found that defendant had waived his right to counsel in the 1993 case. The Supreme Court held that the trial court correctly determined that defendant failed to show by a preponderance of the evidence that

he had not waived his right to counsel, as required by G.S. 15A-980(c). The trial court's conclusion that defendant waived counsel "knowingly, intelligently, and voluntarily" was supported by its findings of fact, which in turn were supported by the evidence.

***State v. Carpenter*, 155 N.C. App. 35, 573 S.E.2d 668 (2002).** The trial court erred by denying defendant's motion to dismiss his habitual felon indictment, because the State failed to prove that the alleged prior convictions from New Jersey were felonies.

***State v. Wall*, 141 N.C. App. 529, 539 S.E.2d 692 (2000).** Defendant was convicted of two felony offenses and of being an habitual felon. He argued on appeal that G.S. 14-7.4 requires a certified copy of court records, and that the trial court erred by admitting a facsimile of a certified copy of court records as proof of his prior felony larceny conviction. The Court of Appeals found no error, holding that G.S. 14-7.4 does not limit proof of prior convictions to certified copies. Based on the trial court's observations about the facsimile, and its own review of the document, the Court of Appeals concluded that it bore sufficient indicia of reliability to satisfy G.S. 14-7.4.

***State v. Smith*, 139 N.C. App. 209, 533 S.E.2d 518 (2000).** Defendant was convicted of two counts of habitual misdemeanor assault and habitual felon status. On appeal, he argued that the trial court erred by sentencing him as an habitual felon because the habitual misdemeanor assault statute does not create a substantive felony offense, but merely confers a status for sentencing purposes. Based on the language of G.S. 14-33.2, the Court of Appeals concluded that the Legislature intended habitual misdemeanor assault to be a substantive Class H felony.

Habitual felon status and prior record level *G.S. 14-7.6*

***State v. Cates*, 154 N.C. App. 737, 573 S.E.2d 208 (2002).** Defendant was convicted of possession of heroin as an habitual felon. On appeal, he argued that his sentence violated the Due Process Clause of the Fourteenth Amendment and the rule of lenity, because the prosecutor used his least serious convictions to establish his habitual felon status, reserving his most serious offenses for his prior record level calculation. As a result, his sentence was higher than it would have been absent "the prosecutor's manipulation of [his] prior record. The Court of Appeals found that, because G.S. 14-7.6 is not ambiguous about the use of prior convictions, defendant's sentence did not violate principles of lenity or due process.

***State v. Lee*, 150 N.C. App. 701, 564 S.E.2d 597 (2002).** Defendant pled guilty to robbery with a dangerous weapon and habitual felon status. His habitual felon indictment alleged five prior convictions, and the trial court used one of these convictions in calculating defendant's prior record level. The Court of Appeals remanded for resentencing. "By using the five felony convictions in the habitual felon indictment, the State was precluded from using the same five convictions to increase defendant's prior record level points pursuant to G.S. 14-7.6."

***State v. McCrae*, 124 N.C. App. 664, 478 S.E.2d 210 (1996).** In determining defendant's prior record level, the trial court assigned points for a prior conviction that was consolidated for judgment with a conviction used to establish defendant's habitual felon status. The Court of Appeals found no error. When prior offenses are consolidated for judgment, one may be used for habitual felon status and a second may be used to confer prior record points. *Accord State v. Truesdale*, 123 N.C. App. 639, 473 S.E.2d 670 (1996).

***State v. Misenheimer*, 123 N.C. App. 156, 472 S.E.2d 191 (1996).** The trial court relied on prior

convictions of habitual impaired driving to establish defendant's habitual felon status. The same prior convictions for habitual impaired driving were also used as elements of defendant's current felony of habitual impaired driving. The Court of Appeals affirmed the trial court's judgment. Although G.S. 14-7.6 prohibits the use of a prior conviction for both habitual felon status and prior record points, nothing in G.S. 14-7.6 prohibits the use of a prior conviction to prove the substantive offense of habitual impaired driving and defendant's habitual felon status.

***State v. Bethea*, 122 N.C. App. 623, 471 S.E.2d 430 (1996).** The trial court assigned defendant one prior record point because all the elements of the present offense were included in a prior conviction, G.S. 15A-1340.16(b)(6), and a second point because defendant was on probation at the time of the present offense, G.S. 15A-1340.16(b)(7). The convictions supporting these prior record points were also used to establish defendant's habitual felon status. The Court of Appeals affirmed. It concluded that that the prior record points assessed in G.S. 15A-1340.16(b)(6) and (7) spoke to the timing and nature of the sentencing offense, rather than the mere existence of the prior convictions. Therefore, defendant's sentence did not violate the bar in G.S. 14-7.6 against double-counting prior convictions for both habitual felon status and the prior record level.

Admission to habitual felon status is akin to a guilty plea

***State v. Gilmore*, 142 N.C. App. 465, 542 S.E.2d 694 (2001).** Defendant stipulated to the three prior felony convictions and to habitual felon status. The Court of Appeals reversed the habitual felon conviction and remanded for resentencing. Under G.S. 14-7.5, the habitual felon charge must be submitted to the jury or defendant must plead guilty to it. Here, the charge was not submitted to the jury and the trial court did not ask defendant the necessary questions to establish a record of a guilty plea pursuant to G.S. 15A-1022(a).

***State v. Williams*, 133 N.C. App. 326, 515 S.E.2d 80 (1999).** Defendant was convicted of common law robbery as an habitual felon. On appeal, she argued that she did not plead guilty to habitual felon status. The Court of Appeals found that defendant had stipulated to her habitual felon status and that the trial court had asked her the appropriate questions to establish a record of a knowing, voluntary, and intelligent guilty plea. Therefore, defendant did in fact plead guilty to the habitual felon charge despite the fact that she did not expressly admit her guilt.

Evidence adduced at trial can be used to establish habitual felon status

***State v. Hoskins*, __ N.C. App. __, __ S.E.2d __ (Jan. 15, 2013).** During defendant's trial for failure to register as a sex offender, the State introduced evidence of defendant's 1987 conviction for first degree sexual offense. After the jury returned its guilty verdict, the court held a hearing on defendant's habitual felon status. The State presented evidence of defendant's additional felony convictions in 1978 and 1972. Defendant moved to dismiss the habitual felon charge on the ground that the State offered proof of only two prior felonies. The trial court denied the motion; and the Court of Appeals found no error. Because the habitual felon proceeding was ancillary to the trial on the principal offense, it was unnecessary for the State to reintroduce evidence that had been adduced at trial.

F. Committed Youthful Offenders

G. Parole

H. Appellate Review

Preserving issues for appeal

***State v. Miller*, 205 N.C. App. 291, 695 S.E.2d 149 (2010) (quoting *State v. Cloer*, 197 N.C. App. 716, 722, 678 S.E.2d 399, 404 (2009)).** Because defendant had not raised the issue in the trial court, the Court of Appeals declined to review his claim that he was entitled to additional credit for time spent in pretrial confinement. The Court noted that "defendant may 'file a motion for an award of additional credit in the superior court . . . pursuant to [G.S.] 15-196.4.'"

***State v. Hager*, 203 N.C. App. 704, 692 S.E.2d 404 (2010) (quoting *State v. Scott*, 180 N.C. App. 462, 464, 637 S.E.2d 292, 293 (2006)).** "'[E]rrors as to sentencing are appealable if there has been an incorrect finding of the defendant's prior record level even in the absence of an objection at trial[.]'" *Accord State v. Matthews*, 175 N.C. App. 550, 623 S.E.2d 815 (2006).

***State v. Mauer*, 202 N.C. App. 546, 688 S.E.2d 774 (2010) (citing *State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004)). "**[T]his Court has consistently held that pursuant to [G.S.] 15A-1446(d)(18) (2007) a defendant's failure to specifically object to the trial court's entry of an award of restitution does not preclude appellate review." *But cf. State v. Best*, 196 N.C. App. 220, 674 S.E.2d 467 (2009) (Because defendant neither objected to the trial court's restitution award nor moved to amend the judgment, his challenge to the restitution award was not cognizable on appeal. In order to prevent manifest injustice, the Court of Appeals reviewed the issue pursuant to its discretionary authority under N.C.R. App. P. 2.).

***State v. Black*, 197 N.C. App. 731, 678 S.E.2d 689 (2009) (citing *State v. Jaynes*, 342 N.C. 249, 263, 464 S.E.2d 448, 457 (1995)).** Defendant claimed on appeal that the aggravation of his sentence based on a prior adjudication of juvenile delinquency violated the Sixth Amendment under *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004), inasmuch as a juvenile adjudication is not determined by a jury. Because he had not raised this constitutional issue in the trial court, the Court of Appeals held that it could not be raised for the first time on appeal.

***State v. Roberts*, 351 N.C. 325, 523 S.E.2d 417 (2000).** Defendant was sentenced to eight to ten months' imprisonment for his Class E felony and Prior Record Level II. The Department of Correction notified the Clerk of Superior Court that the sentence did not fall within the sentencing range for a Class E felony under Structured Sentencing. The trial judge entered an amended judgment *ex parte*, sentencing defendant within the applicable range to a term of 29 to 44 months' imprisonment. Defendant filed a motion for appropriate relief challenging the modification of his sentence. After a hearing with both defendant and his attorney present, a second judge set aside the amended judgment and re-sentenced defendant to prison for 29 to 44 months, within the correct sentencing range. The Court of Appeals allowed defendant's petition for writ of certiorari for the limited purpose of vacating the judgment entered by the second judge and reinstating defendant's original, incorrect sentence. The Supreme Court reversed, finding that trial courts are required to comply with the Structured Sentencing Act, and that unlawful sentences may be corrected via appeal or post-conviction motion for appropriate relief. The Supreme Court remanded for reinstatement of the corrected sentence.

Addressing issues outside the parties statutory right of appeal *G.S. 15A-1445*

***State v. Watkins*, 189 N.C. App. 784, 659 S.E.2d 58 (2008).** The trial court erred by running a sentence under the Habitual Felons Act concurrently with a sentence defendant was serving in federal prison. G.S. 14-7.6 ("Sentences imposed under this Article shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced under this section."). Although G.S. 15A-1445 did not authorize the State to appeal the imposition of a concurrent sentence, the Court of Appeals invoked N.C.R. App. P. 2 and reviewed the issue by writ of mandamus.

SECTION III: PROVISIONS RELATING TO POST-RELEASE SUPERVISION

A. Eligibility and Procedures

B. Term of Post-Release Supervision

C. Conditions of Post-Release Supervision

D. Violations of Post-Release Supervision

Revocation of post-release supervision is not "jeopardy"

***State v. Sparks*, 362 N.C. 181, 657 S.E.2d 655 (2008).** Following his conviction for reportable sex offenses, defendant was released from prison onto post-release supervision (PRS). The Post-Release Supervision and Parole Commission revoked defendant's PRS after receiving a report from his supervising officer that he had absconded. While serving the remainder of his sentence, defendant was charged with failing to notify the sheriff about his change of address in violation of G.S. 14-208.9. He successfully moved to dismiss the charge on double jeopardy grounds, arguing that he had already been punished for his actions by being imprisoned for violating his PRS. The Supreme Court disagreed. The reinstatement of the remaining nine months of defendant's original sentence for violating PRS did not constitute a new punishment. Therefore, the Double Jeopardy Clause did not bar defendant's prosecution for failing to register as a sex offender, even though the same conduct led to the revocation of his PRS.

Credit for confinement pending a violation hearing *G.S.15-196.1*

***State v. Corkum*, __ N.C. App. __, __ S.E.2d __ (Dec. 4, 2012).** Defendant was held for eight days prior to his first post-release supervision (PRS) revocation hearing. Although he admitted the charged violations, the Post Release Supervision and Parole Commission released him back

onto supervision. Defendant's PRS was later revoked for a second violation, however, and he was imprisoned to serve the remainder of his sentence. The trial court denied defendant's request under G.S. 15-196.1 for credit against his sentence for the eight days spent in pre-hearing confinement. The Court of Appeals reversed. Section 15-196.1 requires crediting of "the total amount of time a defendant has spent, committed to or in confinement in any State or local correctional . . . institution as a result of the charge that culminated in the sentence[,]" including "all time spent in custody . . . pending . . . [a] post-release supervision revocation hearing." Even though the first revocation hearing did not result in re-imprisonment, the Court explained, "Both the eight days defendant spent in confinement awaiting his first post-release supervision revocation hearing and the activated nine-month sentence are a result of the original charges."

PART II. STRUCTURED SENTENCING FOR MISDEMEANORS

Imposing Sentences for Misdemeanors

Step 1. Determine the Misdemeanor Class

A. Misdemeanor Offense Class

Date of offense

***State v. Lawrence*, 193 N.C. App. 220, 667 S.E.2d 262 (2008).** Defendant was convicted of first degree sexual offense and received a sentence of life imprisonment under the Fair Sentencing Act. On appeal, he claimed that he should have been sentenced to a term of months under Structured Sentencing, absent sufficient evidence that his crime occurred prior to the effective date of the Structured Sentencing Act on October 1, 2004. The Court of Appeals agreed. Offenses committed prior to October 1, 1994 are sentenced under Fair Sentencing; offenses committed between October 1, 1994 and December 1, 1995 are sentenced under the original version of Structured Sentencing (*see* 1993 N.C. Sess. Laws ch. 538, § 1); and offenses committed on or after December 1, 1995 are sentenced under the amended version of Structured Sentencing (*see* 1995 N.C. Sess. Laws ch. 507, § 19.5). The indictment alleged a date of offense between June 1, 1994 and July 31, 1994. The victim, whose seventh birthday was on October 8, 1994, testified that the incident occurred when she was "around seven" years of age. A detective testified that the victim told him that the incident occurred when she "was seven years old." In seeking a life sentence, the State was obliged to prove that the Fair Sentencing Act applied to defendant's crime. The Court of Appeals found that the witness testimony "support[ed] only a suspicion or conjecture that the crime occurred prior to [October 1,] 1994."

***State v. Poston*, 162 N.C. App. 642, 591 S.E.2d 898 (2004).** Defendant was convicted of two first degree statutory sexual offenses, one of which allegedly occurred in 1994, before the effective date of the Structured Sentencing Act. For that count, the trial court sentenced defendant under the Fair Sentencing Act as a Class B felon, giving him life imprisonment. The Court of Appeals remanded for resentencing, holding that the State failed to prove that the offense occurred before the effective date of Structured Sentencing. Since under Structured Sentencing defendant would be a Class B1 felon with a term of months (rather than life), the doubt should be resolved against the harsher sentence.

***State v. Mullaney*, 129 N.C. App. 506, 500 S.E.2d 112 (1998).** The trial court sentenced defendant under the Fair Sentencing Act for a conviction of embezzlement. The offense occurred over several dates, spanning a period of time from prior to the enactment of Structured Sentencing to after its effective date. A divided panel of the Court of Appeals held that, because the State chose to charge one offense instead of separate offenses for each transaction, and the indictment alleged that the offense was not concluded until after October 1, 1994, defendant must be sentenced under the Structured Sentencing Act.

B. Conspiracy to Commit a Misdemeanor

C. Attempt to Commit a Misdemeanor

D. Solicitation to Commit a Misdemeanor

E. Misdemeanor Offense Class Enhancements

Ethnic animosity enhancement may apply if defendant and victim are of same race *G.S. 14-3*

***State v. Brown*, 202 N.C. App. 499, 689 S.E.2d 210 (2010).** A defendant who commits a misdemeanor against a victim of the same race is subject to the ethnic animosity enhancement in G.S. 14-3, if the offense is motivated by the victim's association with a member of another race. Accordingly, the Court of Appeals upheld a white defendant's conviction for assault with a deadly weapon with ethnic animosity, upon evidence that he "shot at [the victim] because [the victim] was a white man in a relationship with an African-American woman."

Step 2. Determine the Prior Conviction Level

A. Determining the Prior Conviction Level

What qualifies as a prior conviction?

***State v. Reaves*, 142 N.C. App. 629, 544 S.E. 2d 253 (2001).** A prior finding of criminal contempt does not result in any prior record points.

***State v. Rich*, 130 N.C. App. 113, 502 S.E.2d 49 (1998).** The court rejected defendant's argument that prior convictions which occurred ten years before the current offense should not be counted in determining prior record level. There is no statute of limitation on the use of prior convictions to determine prior record level.

B. Definition of a Prior Conviction

Meaning of "Prior"

***State v. Pritchard*, 186 N.C. App. 128, 649 S.E.2d 917 (2007).** In calculating a defendant's prior record level at re-sentencing, the court should take into account any convictions obtained since the original sentencing proceeding but prior to the entry of judgment at resentencing.

***State v. West*, 180 N.C. App. 664, 638 S.E.2d 508 (2006).** Defendant was convicted of second-degree murder, two counts of felony larceny, and one count of breaking and entering a motor

vehicle. After sentencing defendant for the larcenies and breaking and entering, the trial court recessed the proceedings for lunch. "Upon reconvening, the trial court assigned defendant two prior record points for one of the Class H larcenies and proceeded to sentence defendant for second[-]degree murder as a [Prior Record] Level II offender." While noting Structured Sentencing's silence on the issue, the Court of Appeals held that offenses joined for trial with the sentencing offense may not be used in calculating a defendant's prior record level. The Court remanded for resentencing on the murder conviction.

Meaning of "Conviction"

***State v. Bidgood*, 144 N.C. App. 267, 550 S.E.2d 198 (2001).** Defendant was sentenced as a Prior Record Level V. One of his prior convictions was later overturned on appeal. Without this conviction, defendant would have had a Prior Record Level IV. The Court of Appeals held that he was entitled to resentencing. Although G.S. 15A-1340.11(7) states that a prior conviction exists when defendant has been convicted of a crime in superior court, regardless of whether the conviction is on appeal, the Court concluded that it would be unjust (and contrary to legislative intent) to deny defendant resentencing under these circumstances.

***State v. Reaves*, 142 N.C. App. 629, 544 S.E. 2d 253 (2001).** Being held in criminal contempt is not a "prior conviction" for sentencing purposes.

***State v. Hatcher*, 136 N.C. App. 524, 524 S.E.2d 815 (2000).** The trial court assessed prior record points for an offense that defendant pled no contest and for which prayer for judgment was continued. The Court of Appeals affirmed. Citing G.S. 15A-1331(b), the Court held that a person is considered to have been convicted when he has been found guilty or has entered a plea of guilty or no contest. Formal entry of judgment is not required.

***State v. Hasty*, 133 N.C. App. 563, 516 S.E.2d 428 (1999).** In calculating defendant's prior record level, the trial court counted a prior conviction for which defendant was on probation at the time of the current offense under the provisions of G.S. 90-96(a). Section 90-96(a) allows for the dismissal of a conviction if a defendant completes all the conditions of probation. Defendant argued that his prior Chapter 90 conviction should not count. The Court of Appeals ruled that defendant's prior conviction did count for sentencing purposes. Defendant had pled guilty to the prior offense; and the conviction had not been dismissed, because defendant had not completed the term of probation before committing the new offense.

C. Considering Multiple Prior Convictions

Convictions obtained in one court week *G.S. 15A-1340.21(d)*

***State v. Fuller*, 179 N.C. App. 61, 632 S.E.2d 509 (2006).** If a defendant sustains convictions in district court and superior court on the same day, one district court conviction and one superior court conviction may be used for prior record points.

***State v. Wilkins*, 128 N.C. App. 315, 494 S.E.2d 611 (1998).** Defendant challenged the trial court's assessment of two prior record points for two Class 1 misdemeanor convictions. Defendant was convicted of the offenses in district court on separate days but argued that, after he withdrew his appeal, the cases were remanded and judgment entered on the same day during the same session of court. The Court of Appeals held that, for purposes of calculating a prior

record level, if a defendant appeals a district court conviction to superior court and later withdraws the appeal, the conviction is deemed to occur on the date of conviction in district court.

D. Proof of Prior Convictions

Prosecutor's representation is insufficient

***State v. Bartley*, 156 N.C. App. 490, 577 S.E.2d 319 (2003).** Defendant was sentenced based on the prosecutor's statement that, "in this case the defendant has 11 prior sentencing points, placing him at Prior Record Level [IV]." The Court of Appeals remanded for resentencing. Defendant's prior record was not stipulated to or proven through copies of records. A prosecutor's statement, though uncontested, does not meet the State's burden of proof.

***State v. Smith*, 155 N.C. App. 500, 573 S.E.2d 618 (2002).** The trial court relied on the sentencing worksheet submitted by the district attorney without further documentation or stipulation by defendant. The Court of Appeals held that the State failed to prove the existence of defendant's prior convictions by a preponderance of the evidence.

Stipulation of the parties *G.S. 15A-1340.21(c)(1)*

***State v. Boyd*, 200 N.C. App. 97, 682 S.E.2d 463 (2009).** Shown a prior record level worksheet, the *pro* se defendant asked, "What does that mean?" The trial court explained that the worksheet indicated defendant had "seven prior conviction points for purposes of sentencing, which would mean you would be what is known as a Level 3[.]" Asked if he had anything to say, defendant announced his desire to appeal. The Court of Appeals remanded for resentencing, finding that defendant's remarks did not amount to a stipulation under G.S. 15A-1340.14(f).

***State v. Hussey*, 194 N.C. App. 516, 669 S.E.2d 864 (2008).** Although a prior record level worksheet does not constitute proof of a prior conviction under G.S. 15A-1340.14(f), the Court of Appeals recognized that the worksheet form has been modified to allow the parties to stipulate to the listed convictions. Accordingly, the court held that the stipulation signed by the prosecutor and defense counsel on the prior record level worksheet was sufficient to establish defendant's prior convictions under G.S. 15A-1340.14(f)(1).

***State v. Hurley*, 180 N.C. App. 680, 637 S.E.2d 919 (2007).** Seeking a sentence at "the very top[]of the presumptive range. A [Prior Record] Level [V,]" the prosecutor tendered a sentencing worksheet and stated, "Judge, as you can see from his record how many convictions he has. He's been stealing for a living since 1990." The judge offered to hear from defendant and his counsel. Counsel requested that defendant be granted work release, "whatever sentence the Court gives him[.]" Defendant declined the opportunity to speak. "While the sentencing worksheet . . . was alone insufficient to establish defendant's prior record level," the Court of Appeals held that "the conduct of defendant's counsel during the course of the sentencing hearing constituted a stipulation [to] defendant's prior convictions" under G.S. 15A-1340.14(f).

***State v. Alexander*, 359 N.C. 824, 616 S.E.2d 914 (2005).** Defendant pled guilty to assault with a deadly weapon with intent to kill inflicting serious injury. His plea agreement provided that "the State will agree that the defendant be sentenced to a minimum of 80 months and a maximum of 105 months." The prosecutor tendered a prior record level worksheet that assigned defendant one prior record point for a misdemeanor conviction, and a Prior Record Level II. Defense

counsel stated to the trial court that "until this particular case [defendant] had no felony convictions, as you can see from his worksheet." The agreed-upon sentence fell within the presumptive range for defendant's Class C felony and a Prior Record Level II. Based on all the circumstances, the Supreme Court held that "defense counsel's statement to the trial court constituted a stipulation of defendant's prior record level pursuant to [G.S.] 15A-1340.14(f)(1)."

***State v. Jeffery*, 167 N.C. App. 575, 605 S.E.2d 672 (2004).** Defendant was sentenced at Prior Record Level III pursuant to a plea agreement with a negotiated sentence. The State submitted no evidence of defendant's prior convictions other than the prior record worksheet. The Court rejected the State's argument that defendant's negotiation of a specific sentence (which fit within the presumptive range for the cell of the Felony Punishment Chart where Prior Record Level III would place him) constituted a stipulation to the contents of the worksheet. The Court noted that in the absence of some colloquy between defendant and the trial court that otherwise supported the contents of the worksheet, the duration of the negotiated sentence was not sufficient to establish defendant's prior record level.

***State v. Eubanks*, 151 N.C. App. 499, 565 S.E.2d 738 (2002).** In calculating defendant's prior record level, the only evidence presented by the State was a prior record level worksheet listing five prior convictions between 1958 and 1999. Defendant's attorney was presented with the worksheet and stated that he had no objections. The Court of Appeals held that although a worksheet prepared and submitted by the State listing a defendant's prior convictions is, alone, insufficient to satisfy the State's burden in establishing proof of prior convictions, the statements made by defense counsel were reasonably construed as a stipulation by defendant that he had been convicted of the charges listed on the worksheet.

***State v. Hamby*, 129 N.C. App. 366, 499 S.E.2d 195 (1998).** Defendant entered a guilty plea under a written plea agreement providing as follows: "Charge is Class E felony and defendant has a record level of II. The defendant will receive a sentence of 29 mo[nths] min. -- 44 mo[nths] max." The Court of Appeals held that, by admitting to a Prior Record Level II and agreeing to the specified sentencing range, "defendant mooted the issues of whether her prior record level was correctly determined . . . and whether the duration of her prison sentence was authorized."

Copy of DCI, DMV, or AOC Records *G.S. 15A-1340.21(c)(3)*

***State v. Best*, 202 N.C. App. 753, 690 S.E.2d 58 (2010)**. A printout of the prosecutor's email to defense counsel, with "a screenshot from the Administrative Office of the Courts ("AOC") computerized criminal record system showing defendant's prior conviction for assault by pointing a gun in Mecklenburg County[,]" was held sufficient to prove the prior conviction under G.S. Stat. 15A-1340.14(f). The Court of Appeals ruled that the email qualified as a "copy" of a "record maintained electronically" by AOC under G.S. 15A-1340.14(f)(3). The record's inclusion of defendant's name, date of birth, case number, charged offense, date and location of arrest, and victim's name provided "sufficient identifying information with respect to defendant to give it the indicia of reliability to prove defendant's prior convictions under [G.S.] 15A-1340.14(f)(4)."

***State v. Crockett*, 193 N.C. App. 446, 667 S.E.2d 537 (2008).** The State met its burden of proving defendant's prior conviction under G.S. 15A-1340.14(f) by "introduc[ing] a computerized criminal history from the Department of Criminal Information (DCI report) and a printout from records maintained by the Mecklenburg County Sheriff's Department."

***State v. Rich*, 130 N.C. App. 113, 502 S.E.2d 49 (1998).** The Court of Appeals upheld the trial court's finding that a computer printout from the Division of Criminal Information (DCI) had sufficient identifying information, such as defendant's fingerprint identifier number and FBI number, to be used to establish defendant's prior record.

Any other method found by the court to be reliable *G.S. 15A-1340.21(c)(4)*

***State v. Fortney*, 201 N.C. App. 662, 687 S.E.2d 518 (2010).** A computerized criminal history printout from the FBI's National Crime Information Center ("NCIC") database -- which included the offender's name, date of birth, sex, race, height, weight, eye color, hair color, scars, and tattoos -- was sufficient proof of out-of-state convictions under G.S. 15A-1340.14(f).

E. Burden of Proof

F. Suppression of Prior Record

***State v. Blocker*, __ N.C. App. __, 727 S.E.2d 290 (2012).** The sentencing court erred in summarily denying defendant's "Motion to Suppress Prior Conviction for Sentencing Purposes" pursuant to G.S. 15A-980. The court concluded that defendant's motion was an impermissible collateral attack of her prior 2007 conviction under *Boykin v. Alabama*, 395 U.S. 238, 23 L. Ed. 2d 274 (1969). The Court of Appeals noted, however, that defendant was not attempting to undo her prior conviction but was merely seeking to suppress its consideration at sentencing on her 2009 offenses, as contemplated by G.S. 15A-980. The cause was remanded to determine whether defendant's prior conviction was obtained in violation of her right of counsel.

Step 3. Select the Sentencing from the Sentencing Range

A. Sentence Ranges

Step 4. Select the Sentence Disposition

A. Sentence Disposition on Punishment Chart

B. Active Punishment

Active sentence must be continuous

***State v. Miller*, 205 N.C. App. 291, 695 S.E.2d 149 (2010).** Defendant's thirty-day sentence was activated upon revocation of probation. The trial court denied his request to serve his sentence two days per week over fifteen weeks. On appeal, defendant argued that the court failed to recognize its authority under Structured Sentencing to impose an active sentence of this nature.

The Court of Appeals disagreed, finding "no provision of Article 81B that authorizes an active sentence of nonconsecutive days."

C. Intermediate Punishment

D. Community Punishment

E. Fines

F. Active Punishment for Time Served Awaiting Trial

Step 4A. Imposing an Active Punishment

A. Amount of Time to Be Served

B. Earned Time

C. Multiple Convictions

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1. Concurrent sentences

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2. Consecutive sentences

Limit on consecutive sentences applies even if suspended *G.S. 15A-1340.22*

***State v. Wheeler*, 202 N.C. App. 61, 688 S.E.2d 51 (2010).** Defendant was convicted of three misdemeanors, the most serious of which was the Class A1 misdemeanor of assault inflicting serious injury. The trial court imposed consecutive suspended sentences totaling 165 days and placed defendant on supervised probation. The Court of Appeals remanded for resentencing, holding that defendants' consecutive sentences violated G.S. 15A-1340.22,

because they "exceed[ed] twice the maximum sentence authorized for the class and prior conviction level of the most serious offense." The maximum sentence for a Class A1 misdemeanor and defendant's prior conviction level II was 75 days. Defendant's sentences, although suspended, exceeded the 150-day term authorized by G.S. 15A-1340.22.

Sentences are presumptively concurrent, unless specified *G.S. 15A-1354(a)*

***State v. Crumbley*, 135 N.C. App. 59, 519 S.E.2d 94 (1999).** At the time of sentencing, the trial court did not indicate whether the sentences imposed were to run consecutively or concurrently. The trial court subsequently entered written judgments with consecutive sentences. The Court of Appeals vacated and remanded "for the entry of a new sentencing judgment." The written judgment controls over a sentence announced in open court. However, because the trial judge failed to announce consecutive sentences in court, the effect was to impose concurrent sentences under G.S. 15A-1354(a). Therefore, the judge erred by altering the sentences to run consecutively outside of defendant's presence and without providing him an opportunity to be heard.

Consecutive sentences and double jeopardy

***State v. Rich*, 130 N.C. App. 113, 502 S.E.2d 49 (1998).** The trial court ordered that defendant's sentences for first-degree burglary and common law robbery run consecutively. In affirming the trial court, the Court of Appeals held that where the offenses for which defendant is sentenced are two distinct criminal offenses which require proof of different elements, there is no requirement that the sentences be merged. Accordingly, defendant's consecutive sentences did not violate the constitutional prohibition against double jeopardy.

3. Consolidated offenses

Resentencing is required after vacating any consolidated offense

***State v. Toney*, 187 N.C. App. 465, 653 S.E.2d 187 (2007).** Defendant was convicted of five offenses, including felony possession with intent to sell or delivery marijuana and misdemeanor knowingly maintaining a place for the purpose of keeping or selling controlled substances. The trial court consolidated the five offenses into a single judgment and sentenced defendant for the felony. On appeal, the Court of Appeals reversed the misdemeanor conviction for maintaining a dwelling but affirmed the remaining convictions. Relying on *State v. Brown*, 350 N.C. 193, 513 S.E.2d 57 (1999), the Court of Appeals remanded for resentencing. Although the trial court had sentenced defendant for the most serious of the consolidated offenses, the reviewing court could not assume that the vacated misdemeanor conviction had no affect on the sentencing decision.

Consolidating offenses is discretionary

***State v. Hueto*, 195 N.C. App. 67, 671 S.E.2d 62 (2009).** Although the decision to consolidate offenses for judgment is discretionary, the trial court may not base its decision to impose separate sentences on defendant's exercise of the right to a jury trial. Because the pre-trial trial court's pretrial statements supported a reasonable inference that its decision to impose eight consecutive sentences was based in part on defendant's decision to proceed to trial in lieu of pleading guilty, the Court of Appeals remanded for a new sentencing hearing.

See also State v. Haymond, 203 N.C. App. 151, 691 S.E.2d 108 (2010) (remanding for resentencing where, "as in *Hueto*, we believe it may be reasonably inferred from the trial court's statements that it made this decision [*i.e.*, to impose ten consecutive habitual felon sentences in lieu of consolidating any of defendant's convictions] based at least in part on defendant's decision to refuse the State's plea").

***State v. Moffitt*, 185 N.C. App. 308, 648 S.E.2d 272 (2007).** Defendant originally received a sentence of 34 to 50 months for conspiracy, and a consecutive sentence of 145 to 183 months for consolidated offenses of two counts of first-degree kidnapping, two counts of armed robbery and one count of breaking or entering. On remand, the trial judge consolidated the offenses differently, sentencing defendant to 70 to 93 months for the two kidnappings and a consecutive term of 61 to 83 months for the remaining charges. The Court of Appeals rejected defendant's claim that he was sentenced more severely on remand in violation of G.S. 15A-1335. Defendant's initial sentences totaled 179 to 233 months. His sentences on remand totaled only 131 months to 176 months. Quoting *State v. Ransom*, 80 N.C. App. 711, 343 S.E.2d 232 (1986), the Court noted that "nothing [in G.S. 15A-1335] prohibits the trial court from changing the way in which it consolidated convictions" in a prior sentencing proceeding.

Offenses governed by different sentencing laws cannot be consolidated

***State v. Branch*, 134 N.C. App. 637, 518 S.E.2d 213 (1999).** Defendant was convicted of two counts of breaking and entering and larceny with offense dates of September 19, 1994 and October 4, 1994. The trial court consolidated the offenses and sentenced him under Structured Sentencing to a minimum of twelve months and a maximum of fifteen months of imprisonment. The Department of Correction sent the judgment back indicating that offenses governed by the Fair Sentencing Act could not be combined for sentencing with offenses governed by Structured Sentencing. At resentencing, defendant received twelve to fifteen months for the October 4, offenses and ten years for the September 19 offenses. On appeal, defendant argued that there was no bar to consolidating the offenses, and that the new sentencing hearing was unlawful. The Court of Appeals found no error. Offenses may not be consolidated for judgment if they are subject to different sentencing laws. The trial court was authorized to resentence defendant pursuant to G.S. 15A-1415(b)(8), because his original sentence was unlawful at the time imposed.

Step 4B. Imposing an Intermediate Punishment

A. Imposing a Term of Supervised Probation

B. Selecting Intermediate Punishments/Setting Lengths

C. Intermediate Conditions

Step 4C. Imposing a Community Punishment

A. Selecting the Community Punishment

Restitution amount must be supported by evidence

***State v. Mauer*, 202 N.C. App. 546, 688 S.E.2d 774 (2010).** The Court of Appeals vacated a restitution award for want of evidence and remanded for a rehearing. "[A] restitution worksheet, unsupported by testimony or documentation, is insufficient to support an order of restitution." Nor did defendant's silence when judgment was announced in open court constitute a stipulation to the $259.25 in restitution ordered by the trial judge.

Restitution is for harm "directly and proximately" caused by the offense *G.S. 15A-1340.34*

***State v. Best*, 196 N.C. App. 220, 674 S.E.2d 467 (2009).** The Court of Appeals vacated a restitution award against a defendant convicted of accessory after the fact to murder. In order to support restitution, a defendant's offense must have "directly and proximately harmed" the victim. G.S. 15A-1340.34. When a defendant is an accessory after the fact to murder, the direct causal link is the obstruction of the police investigation, or the covering up of evidence. Here, the evidence showed that defendant washed the exterior and vacuumed the interior of his car and unsuccessfully tried to pick up the principals at a motel the day after the murders. He voluntarily went to the police station several days later and gave a statement implicating the principals. The Court of Appeals found no evidence that defendant's actions hindered the investigation or assisted the principals in evading prosecution. There was thus no "direct and proximate" causal link between defendant's crime and the harm to the victims' families.

Restitution amount must be supported by evidence; findings not required

***State v. Replogle*, 181 N.C. App. 579, 640 S.E.2d 757 (2007).** The Court of Appeals reversed a restitution award and remanded for rehearing, holding that "the amount of restitution recommended by the trial court must be supported by evidence[,]" *State v. Shelton*, 167 N.C. App. 225, 605 S.E.2d 228 (2004), and that "unsworn statements of the prosecutor . . . [do] not constitute evidence and cannot support the amount of restitution recommended." *State v. Buchanan*, 108 N.C. App. 338, 423 S.E.2d 819 (1992). Moreover, defendant's failure to object at trial did not constitute a stipulation to the amount of restitution imposed.

***State v. Riley*, 167 N.C. App. 346, 605 S.E.2d 212 (2004).** Defendant pled guilty to six counts of embezzlement, with consecutive sentences suspended for 60 months of supervised probation. The trial court ordered $78,081 in restitution to be paid in monthly installments exceeding $1,300. Defendant presented evidence that her monthly net income was roughly $1,400, and that her monthly expenses totaled over $2,100. The record contained evidence that defendant's husband had an income from his business, but was silent as to his contribution to the family expenses. Defendant appealed the restitution order, arguing that the trial court erred by failing to consider her ability to pay in setting the restitution amount. The Court of Appeals found no error. Defendant's net income was sufficient to cover the monthly restitution payments. By failing to offer evidence as to her husband's income or his contribution to their monthly expenses, she failed to demonstrate that her available resources would be insufficient. The Court further held that, although a restitution order must be supported by some evidence, the trial court need not

make specific findings in support of the award. Because the trial court heard evidence that the total damages were $108,081 and that the victim had received $30,000 in insurance proceeds, there was sufficient evidence to support the restitution award.

***State v. Shelton*, 167 N.C. App. 225, 605 S.E.2d 228 (2004) (citing *State v. Buchanan*, 108 N.C. App. 338, 423 S.E. 2d 819 (1992)).** An "unsworn statement of the prosecutor is insufficient to support" a restitution award.

Court must consider defendant's ability to make restitution *G.S. 15A-1340.36*

***State v. Mucci*, 163 N.C. App. 615, 594 S.E.2d 411 (2004)**: Defendant was sentenced to community punishments upon his conviction for feloniously issuing worthless checks. As conditions of his probation, he was ordered to complete 25 hours of community service per week and to pay $26,239.30 in restitution. The Court of Appeals remanded for resentencing. Under G.S. 15A-1340.36 and 15A-1343(d), the trial court should have considered such factors as defendant's ability to be gainfully employed and earn enough money to both pay restitution and support his family. Moreover, "the trial court also failed to consider defendant's ability to comply with both [probation] conditions simultaneously, as well as meeting his other obligations under the sentence of paying costs and fines."

Restitution not allowed for pain and suffering

***State v. Wilson*, 158 N.C. App. 235, 580 S.E.2d 386 (2003)**: Defendant was convicted of common law robbery and ordered to pay $500 in restitution, $480 of which was for pain and suffering. The Court of Appeals remanded for reduction of the restitution award to $20, holding that restitution cannot include pain and suffering damages. Read together, G.S. 15A-1340.34(b) and 15A-1340.35 clearly limit restitution to tangible costs, income, and values. Pain and suffering, which normally must be determined by a jury, are neither tangible nor easily quantified.

B. Setting the Length of Probation

Non-presumptive probation term must be supported by findings *G.S. 15A-1343.2(d)*

***State v. Branch*, 194 N.C. App. 173, 669 S.E.2d 18 (2008)**: Defendant entered guilty pleas to two misdemeanors and received a community punishment that included 24 months of supervised probation. Under G.S. 15A-1343.2(d)(1), the maximum period of probation that may be imposed with a community punishment for a misdemeanor is 18 months, absent a finding by the court that a longer period of probation is necessary. Because the trial court failed to make the requisite finding to support defendant's 24-month probation term, the Court of Appeals remanded "for resentencing or for entry of findings of fact as to why a longer probationary period is necessary."

Consecutive probation terms not allowed; consecutive suspended sentences allowed

***State v. Cousar*, 190 N.C. App. 750, 660 S.E.2d 902 (2008).** While agreeing with defendant's assertion that a court may not impose consecutive periods of probation, the Court of Appeals found no language in defendant's judgments indicating consecutive probation terms. Rather, the judgments ordered defendant's two suspended prison sentences to run consecutively, which was entirely proper. The Court rejected defendant's claim of error under *State v. Canady*, 153 N.C. App. 455, 570 S.E.2d 262 (2002), explaining that "[o]ur holding in Canady dealt only with

consecutive periods of probation, not consecutive sentences that were suspended." Pursuant to G.S. 15A-1346, defendant's periods of probation were concurrent.

***State v. Canady*, 153 N.C. App. 455, 570 S.E.2d 262 (2002)**: The trial court consolidated two of four offenses for judgment and sentenced defendant to: (1) active imprisonment, (2) a suspended sentence with supervised probation, and (3) another suspended sentence with supervised probation, to run consecutively with the first period of probation. The Court of Appeals held that G.S. 15A-1346 requires sentences of probation to run concurrently.

Appeal from district to superior court stays the probation term

***State v. Smith*, 359 N.C. 618, 614 S.E.2d 279 (2005)**: On 6 December 2000, the District Court placed defendant on 12 months supervised probation for a misdemeanor conviction. He appealed to Superior Court but withdrew his appeal on 29 January 2001. On 24 January 2002, defendant's probation officer filed a violation report. The District Court dismissed the probation violation on the ground that the State failed to file the report before the expiration of the probation period. On appeal, the Superior Court found the violation report to be timely, because defendant's probation had been stayed while his appeal was pending. The Supreme Court agreed. Under G.S. 15A-1431(e) a defendant remains on pretrial release during an appeal from district to superior court, unless the court orders otherwise. Noting "the logical impossibility of a defendant being simultaneously on pretrial release and on probation for the same offense[,]" the Supreme Court held defendant's "probation did not begin until his case was remanded to the district court for execution of the judgment and did not expire until one year after that date."

Modifying or revoking probation after expiration of the probation term *G.S. 15A-1344(f)*

***State v. Hicks*, 148 N.C. App. 203, 557 S.E.2d 594 (2001)**: The trial court suspended defendant's prison sentence and placed him on supervised probation for a term ending on August 18, 1999. Defendant's probation officer signed and dated a Violation Report on July 23, 1999. However, the Violation Report and Order for Arrest were not filed until September 18, 2000, thirteen months after defendant's probation had expired. The trial court held a revocation hearing and activated defendant's sentence. The Court of Appeals found that the trial court lacked jurisdiction over defendant. To preserve the court's jurisdiction beyond the probation term, G.S. 15A-1344(f)(1) "requires the State to '[file] a written motion with the clerk indicating [the State's] intent to conduct a revocation hearing' before the period of probation expires." Because the Violation Report was not timely filed, the judgment was arrested and defendant discharged.

PART III. ADDITIONAL PROVISIONS RELATING TO PROBATION

A. Delegation of Authority

B. Court Responses to Violation of Probation
