

The Simple Yet Confusing Matter of Sentencing (1 hour)

By Senior Resident Superior Court Judge Gary M. Gavenus

Presented for the Watauga County Bar Association

Continuing Legal Education Seminar

Hound Ears Club, Boone, North Carolina

September 23, 2016

Gary M. Gavenus is the Senior Resident Superior Court Judge for the 24th Judicial District, covering Avery, Madison, Mitchell, Watauga and Yancey Counties. Judge Gavenus attended Dickinson College as an undergraduate and obtained his law degree from Wake Forest School of Law. Prior to being elected to the bench, Judge Gavenus worked as an assistant district attorney, serving as the lead prosecutor for serious felonies in several District counties. Judge Gavenus also spent twenty years in private practice with the firms of Hemphill & Gavenus and Wright & Gavenus.

Materials

The Simple Yet Confusing Matter of Sentencing (9 pages)

Transcript(s) of Admission:

- Aggravating DWI
- Aggravating Sentencing Points
- Habitual Impaired
- Habitual Misdemeanor Assault

THE SIMPLE YET CONFUSING MATTER OF SENTENCING

Disclaimer: This presentation only deals with sentencing under the Structured Sentencing Act which became effective October 1, 1994 for offenses occurring on or after that date. I have erased, voluntarily and involuntarily, any and all knowledge I may have had with regard to the Fair Sentencing Act or any other prior law regarding sentencing. I will concentrate for the most part on felony sentencing, touch briefly on DWI, although most of the same principles will apply to misdemeanor sentencing.

Which grid applies: There are currently five (5) felony sentencing grids setting forth minimum and maximum sentences for felony convictions, together with two special grids: one for Class E through B1 reportable sex offenses and one for Advanced Supervised Release. In determining which grid applies, the date of the offense controls. This sounds easy enough until the indictment charges an offense date which overlaps the effective date of one or more grids. In that case, as a general rule, you will use the grid which is most favorable to the defendant. *State v. Poston*, 162 N.C. App 642 (2004). The exception would be where the defendant is charged with a continuing offense in which case you will use the grid in effect at the time that the offense was completed. *State v. Mullaney*, 129 N.C. App. 506 (1998).

The front page of each grid has as its Y axis the felony offense classification for the crime charged and as its X axis the corresponding prior record level with minimum sentence possibilities applicable to each of the three ranges for each record level; Mitigated Range, Presumptive Range and Aggravated Range. The back page of each grid has as its Y axis the felony offense classification for the crime charged and as its X axis the corresponding prior record level with maximum sentence possibilities applicable to each of the three ranges for each record level; Mitigated Range, Presumptive Range and Aggravated Range. Each block in the X axis also provides whether the offense and level allows for a community punishment, intermediate punishment or active sentence punishment.

The reportable sex offense grid gives the corresponding maximum to the minimum which is drawn from the applicable felony sentencing grid. The Advanced Supervised Release grid gives the corresponding ASR term for the minimum and maximum term derived from the applicable felony sentencing grid.

Most sentences entered in Superior court fall within the presumptive range of sentencing. A primary reason for this is that the sentencing judge does not have to make any findings as to aggravating factors or mitigating factors when a plea calls for sentencing in the courts discretion. The North Carolina Sentencing and Policy Advisory Commission April 2016 report indicated that of the active sentences for felonies that were imposed across the State for the fiscal year 2014/15 69% were within the presumptive range, 27% were in the mitigated range and 4% were in the aggravated range. Numbers were only available for active sentences.

An aggravated range sentence can only be imposed if the defendant admits the existence of one or more of the aggravating factors set forth in N.C.G.S. 15A-1340.16(d) or if a jury finds the existence of the aggravating factors beyond a reasonable doubt. Such an admission can only be accepted by a court under the provisions of N.C.G.S. 15A-1022.1 whereby the court must determine whether the State seeks an aggravated sentence, whether the State has given notice of the aggravating factor(s) [See N.C.G.S. 15A-1340.16 (a6) for notice requirements and (a5) as to pleading requirements] or the defendant has waived notice. Thereafter the court must formally notify the defendant that he has the right to have a jury determine the existence of the aggravating factor(s), and that the defendant has the right to prove the existence of mitigating factors at the sentencing hearing before the judge. The court must further find there is a factual basis for the admission to the aggravating factor(s) and that the defendant's admission was given freely, voluntarily and understandingly. Only then can the court sentence the defendant within the aggravated range. [I have attached hereto a Transcript of Admission that I use when a defendant admits to aggravating factors or sentencing points not related to prior convictions. You are more than welcome to use the form in your practice.]

Mitigating factors, on the other hand, are determined by the presiding judge, not a jury, at the sentencing hearing. The defendant has the burden of proving the existence of mitigating factors to the court by the preponderance of the evidence. This should be done through either sworn testimony or through documentation that has been stipulated to by the State. Simply stating that mitigating factors exist is not sufficient in my opinion for the court to find such factors by the preponderance of the evidence.

The most important factor to watch out for in seeking or admitting aggravating factor(s) is that the aggravating factor cannot be an element of the underlying crime to which the defendant is pleading guilty. For instance if the age, mental or physical handicap or infirmity of the victim is an element of the crime then aggravating factor 11 cannot be found or used to enhance punishment, or if the defendant is pleading guilty to an assault with a deadly weapon or robbery with a dangerous weapon then aggravating factor 10 cannot be used to enhance punishment.

If the court is to sentence the defendant within the aggravating range then the court must make findings as to **both** aggravating and mitigating factors and determine in its discretion that the aggravating factors outweigh any mitigating factors.

The quagmire of sentencing lies within the determination of the defendant's prior record level. North Carolina felonies and qualifying misdemeanors are assigned points as shown on the attached prior record level worksheet. [AOC Form 600B to be attached)

The initial rules are simple and easy to apply: 1) The most serious prior conviction of a North Carolina felony or qualifying misdemeanor (A1, 1, DWI, Commercial DWI and misdemeanor death by vehicle) from a term of superior court (week); 2) Only one qualifying misdemeanor from a single session of district court (day); 3) a prayer for judgment continued on a qualifying misdemeanor.

Confusion often arises when dealing with 1) crimes from other jurisdictions; 2) Habitual Felon; 3) Habitual Breaking and Entering; 4) Habitual Misdemeanor Assault; 5) Habitual Impaired Driving; 6) Felony Violation of Domestic Violence Protective Order; or 6) Possession of Firearm by Felon.

Crimes from other Jurisdictions:

Felonies: An out-of-state felony conviction is treated as a Class I felony unless the court makes an independent finding that the crime from out-of-state conviction is substantially similar to a North Carolina crime. If the court so finds then the out-of-state conviction shall be assigned the same felony class as the substantially similar North Carolina Crime. When conducting such an analysis the court must compare the elements of the out-of-state crime to the elements of the substantially similar North Carolina crime. *State v. Hanton*, 175 N.C. App.250 (2006). It is therefore imperative that the court have a copy of the statute setting forth the elements of the out-of-state crime.

Misdemeanors: An out-of-state misdemeanor is treated as a Class 3 misdemeanor and therefore no point is assessed unless the court can make an independent finding that the out-of-state misdemeanor is substantially similar to a North Carolina qualifying misdemeanor. Again, when conducting such an analysis the court must compare the elements of the out-of-state crime to the elements of the substantially similar North Carolina qualifying misdemeanor.

Although the Court of Appeals has held that a defendant may stipulate that a crime is a felony or misdemeanor in another state, (*Hanton*, supra.), I believe you will find most judges reluctant to so find unless they are provided with a copy of the out-of-state statute establishing the felony or misdemeanor classification.

Habitual Felon:

Habitual felon is a status not a substantive offense. As you are aware the defendant must have had three previous non-overlapping felony convictions prior to the commission of the felony for which he is being sentenced to be found a habitual felon.

N.C.G.S. 14-7.6 specifically provides that “In determining the prior record level, convictions used to establish a person’s status as a habitual felon shall not be used.” The same also applies to Armed Habitual felon status. See 14-7.41.

However, if the defendant plead guilty to multiple felonies on the same date as one of the prior felony convictions used to establish his habitual felon status, points may be assessed for a different felony plead on that same date. For example, the defendant previously plead guilty to

Felonious Breaking or Entering and Felonious Larceny after breaking and entering at the same term of superior court. The Felonious Breaking or Entering was used as a predicate felony on the Habitual felon indictment and therefore cannot be used to determine the defendant's prior record level. The Felonious Larceny which was not used as a predicate felony on the other hand can be used to determine the defendant's prior record level.

Assessing points on a prior habitualized felony: If the defendant has a prior conviction that was enhanced due to attaining the status of a Habitual felon, in determining the defendant's prior record level the habitualized prior felony is assessed points on the original (underlying) felony offense classification not on the elevated habitual felon offense classification. State v Vaughn 130 N.C. App. 456 (1998). So a defendant who previously plead guilty or was found guilty of Felonious Breaking or entering and being a Habitual Felon and sentenced as a level D is not assessed 6 points but is assessed 2 points when determining his prior record level.

For offenses which occurred prior to December 1, 2011 a defendant who as attained Habitual Felon Status is sentenced as a Class C felony. Offenses which occurred after December 1, 2011 are sentencing four classes higher than the underlying felony but in any event no higher than a Class C felony.

Habitual Breaking and Entering:

Habitual breaking and Entering is also a status and not a substantive offense. It is sentenced as a Class E felony.

N.C.G.S. 14-7.31(b) provides that "In determining the prior record level, any conviction used to establish a person's status as a status offender shall not be used." So the prior one or more convictions of breaking and entering that are used to establish the habitual breaking and entering status cannot be used to determine the defendant's prior record level.

Once again though if the defendant plead guilty to multiple felony offenses on the same date as the predicate breaking and entering used to establish the status, the other felony offense may be used to determine the defendant's prior record level.

Although I have not find a case on point, I believe the same rule will apply as to in assessing points on a prior habitualized felony breaking and entering. That is, in determining the defendant's prior record level the habitualized felony breaking and entering will be assessed as a Class H felony and not as a Class E felony.

NOTE: pursuant to 14-7.31(c) a conviction of habitual breaking and entering shall not constitute a prior felony conviction for habitual felon status.

Habitual Misdemeanor Assault:

Habitual Misdemeanor assault is a substantive offense. Therefore, the prior convictions used to establish that the defendant is guilty of habitual misdemeanor assault are actually elements of the offense and cannot be used in determining the defendant's prior record level.

As this is a substantive offense, assessing points for such a conviction will be as a Class H felony rather than the misdemeanor classification.

Pursuant to the provisions of N.C.G.S. 14-33.2: “A conviction under this section shall not be used as a prior conviction for any other habitual offense statute.”

Habitual Impaired Driving:

Habitual Impaired Driving is also a Substantive Offense. The three or more prior convictions of impaired driving are actual elements of the crime. The North Carolina Court of Appeals in *State v. Gentry*, 135 N.C. App 107 (1999) ruled that the impaired driving convictions used to prove the habitual impaired driving may not be used to calculate the defendant’s prior record level.

Again, as this is a substantive offense, assessing points for such a conviction will be as a Class F felony rather than as a conviction for driving while impaired.

Felony Violation of Domestic Violence Protective Order:

Felony Violation of Domestic Violence Protective Order is a Substantive Offense. Therefore the two prior convictions of Violations of a DVPO are elements of the offense and cannot be used in determining the defendant’s prior record level.

Assessing points for a prior conviction of Felony Violation of Domestic Violence Protective Order shall be as a Class H felony rather than as the A1 misdemeanor.

Possession of Firearm by Felon:

Possession of Firearm by Felon is a Substantive Offense. Although the prior felony conviction is an element of the offense, the prior felony conviction is counted in determining prior record points. The Court of Appeals in *State v. Best* 214 N.C. App. 39 (2011), determined that “given that the mere possession of a firearm, unlike driving while impaired [violating domestic violence protective order, misdemeanor assault], is not a criminal offense, the sort of “double counting”, in which an act already declared to constitute a criminal offense is punished more severely based on the defendant’s prior record, simply does not occur when the same conviction is utilized to both establish the defendant’s guilt of the underlying offense and to calculate his prior record level utilized in sentencing him for that offense.”

Points under 15A-1340.14(b) (6) and (7)

Points may also be assessed against a defendant if 1) all of the elements of the present offense are included in a prior conviction offense (15A-1340.14(b) (6); 2) the offense was committed while the defendant was on supervised or unsupervised probation, parole, or post-release supervision (15A-1340.14(b) (6); and/or 3) the offense was committed while the defendant was incarcerated or while on escape from a correctional institution. These are often referred to as non-conviction points, or sentencing points not related to prior convictions.

The first, that the elements of the present offense are included in a prior conviction offense, is a question of law and is determined by the presiding sentencing judge not by a jury.

The existence of the second and third source of points (probation, parole, post-release supervision, incarceration or escape) is a question for a jury unless the defendant admits to the existence of the sentencing point. As with aggravating factors the State must give notice or the defendant must waive notice as to the existence of the point(s), the court must advise the defendant that he has the right to have a jury determine the existence of the sentencing point(s), and that the defendant has the right to prove the existence of mitigating factors at the sentencing hearing before the judge. The court must further find there is a factual basis for the admission to the sentencing point(s) and that the defendant's admission was given freely, voluntarily and understandingly.

ACTUAL SENTENCING

You have the felony classification, you have determined the sentencing points, and the question then becomes what sentence will be imposed. Absent an agreement between the parties which is consented to by the presiding judge, sentencing will be in the sound discretion of the court within the guidelines provided by the appropriate grid.

The opportunity for a community punishment on a felony conviction are very limited. Such a punishment is only available for Class I felonies with a prior record level I or II and Class H felonies prior record level I. Except for Class I, record level I in which a community punishment is mandatory, in the other two situations it will be in the discretion of the court. (Except in extraordinary situations)

Therefore, for the most part you will be attempting to convince the sentencing judge to select an intermediate punishment over an active punishment or an active punishment within the mitigating range over an active punishment within the presumptive or aggravating range. In attempting to do so you should formulate your argument by addressing the purposes of sentencing as they relate to your particular defendant.

N.C.G.S. 15A-1340.12 sets forth the purposes of sentencing and provides:

“The primary purposes of sentencing a person convicted of a crime are to impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender’s culpability [aggravating and mitigating factors come in to play here]; to protect the public by restraining offenders; to assist the offender toward rehabilitation and restoration to the community as a lawful citizen; and to provide a general deterrent to criminal behavior.”

The following results from the April 2016 report of the North Carolina Sentencing and Policy Advisor Commission should provide you with some indication on the active sentence most likely to be imposed by a judge for the type of crime committed:

The type of punishment imposed by crime type is shown in *Table 5*. Relative to other crime types, convictions for person offenses were most likely to result in the imposition of an Active punishment (63%), while convictions for non-trafficking drug offenses were least likely to result in the imposition of an Active punishment (22%). Of the four crime types, non-trafficking drug and property convictions had the highest percentage of Intermediate punishment sentences (36% and 33% respectively). Non-trafficking drug convictions had the highest percentage of Community punishment sentences (42%). *Table 5* also displays the average minimum and maximum sentence lengths for convictions in which an Active punishment was imposed. The longest average Active sentences were imposed for convictions for person offenses.

**Table 5: Convictions and Sentences by Crime Type
FY 2014/15 Felonies**

Crime Type	Active		Intermediate		Community		Minimum Active Sentence (Months)	Maximum Active Sentence (Months)	Total
	#	%	#	%	#	%			
Person	3,082	63	1,278	26	520	11	56	82	4,880
Property	3,602	34	3,565	33	3,597	33	13	25	10,764
Non-Trafficking Drug	1,928	22	3,123	36	3,697	42	16	29	8,748
Other Felony	2,277	54	1,231	29	741	17	33	50	4,249
Total	10,889	38	9,197	32	8,555	30	30	47	28,641

Note: Of the 29,238 felony convictions in FY 2014/15, 597 (or 2.0%) were excluded from this table. These convictions did not fit within the appropriate cell in the Felony Punishment Chart due to discrepant offense classes, prior record levels, or for other reasons (such as consecutive sentencing or extraordinary mitigation). Death and life sentences were excluded from the calculation of the average minimum and maximum sentences.

SOURCE: NC Sentencing and Policy Advisory Commission, FY 2014/15 Statistical Report Data

The sentence location for Active sentences by crime type is presented in *Table 7*. Of the four crime types, convictions for person offenses accounted for the highest percentage of aggravated sentences (6%). Convictions for “other felony” offenses accounted for the lowest percentage of presumptive sentences (56%) and the highest percentage of mitigated sentences (40%) relative to the other crime types. Convictions under the habitual felon law, commonly sentenced in the mitigated range, ⁴ accounted for the largest number of convictions in the “other felony” category, representing 35% of convictions in this category.^s For additional information regarding convictions by crime type, see *Appendix D, Tables 1 and 2*. (To be attached)

**Table 7: Sentencing Range by Crime Type
Active Sentences Only
FY 2014/15 Felonies**

		Sentencing Range					
Mitigated		Presumptive		Aggravated			
Crime Type	#	%	#	%	#	%	Total
Person	841	28	1,990	66	191	6	3,022
Property	747	21	2,730	76	125	3	3,602
Non-Trafficking Drug	431	22	1,415	74	82	4	1,928
Other Felony	921	41	1,279	56	77	3	2,277
Total	2,940	27	7,414	69	475	4	10,829

Note: Convictions that did not fit within the appropriate cell in the Felony Punishment Chart due to discrepant offense classes, prior record levels, or for other reasons (such as consecutive sentencing or extraordinary mitigation) were excluded from this table. Class A convictions, which are subject to mandatory life or death sentences (n=59), and Class B1 convictions with life sentences (n=1) were also excluded from this table.
SOURCE: NC Sentencing and Policy Advisory Commission, FY 2014/15 Statistical Report Data

Probationary Sentences

Where the grid mandates or allows for a probationary sentence, a community punishment may be imposed in limited circumstances as I early indicated or an intermediate punishment may be imposed. I am not going to go into great length with regard to the terms of probation but simply touch upon some of what you should expect and therefore if you are a defense attorney you should advise your client to expect.

Only a defendant who is given a community punishment can be placed on unsupervised probation, all intermediate punishment probationary sentences **must** provide for supervised probation. The likelihood of the judge imposing unsupervised probation on a community punishment is slim. Of the 8,555 community punishments imposed for FY2014-15 only 3% or 257 were placed on unsupervised probation. I would suggest to you that this percentage would be even smaller should the figures only include judgments entered in Superior Court.

The average length probations for community punishments is 25 months and for intermediate punishments it is 28 months. Monetary conditions such as a fine, restitution, and court costs were imposed in 96% of all probationary judgments; Special Probation (split sentence) was imposed in 41% of the intermediate punishments; community service was imposed in 18% of all probations (23% of community punishments); house arrest with electronic monitoring was order in 4% of probationary sentences and 1% of the intermediate punishment sentences ordered Drug Treatment Court. (Drug Treatment Court and Special Probation may only be ordered in intermediate punishments.)

(All Figures taken from NC Sentencing and Policy Advisory Commission, FY 2014/15
Statistical Report Data)

Acknowledge indebtedness to James M. Markham and Jessica Smith of the UNC School of
Government

STATE OF NORTH CAROLINA
COUNTY OF _____

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO: _____

STATE OF NORTH CAROLINA

VS.

TRANSCRIPT OF ADMISSION

_____,
DEFENDANT

The undersigned judge, having addressed the defendant personally in open court, finds that the defendant (1) was duly sworn or affirmed, (2) entered an admissions to the existence of aggravating factor sentencing points not related to prior convictions) pursuant to the provisions of N.C.G.S. 20-179 and (3) offered the following answers to the questions set out below:

- | | Answer |
|--|---------------|
| 1. Are you able to hear and understand me? | (1) _____ |
| 2. Do you understand that you have the right to remain silent and that any statement you Make may be used against you? | (2) _____ |
| 3. At what grade level can you read and write? | (3) _____ |
| 4. (a) Are you now under the influence of alcohol, drugs, narcotics, medicines, pills, or any other substances? | (4a) _____ |
| (b) When was the last time you used or consumed any such substance? | (4b) _____ |
| 5. Have the aggravating factor(s) been explained to you by your lawyer and do you understand the nature of the aggravating factors | (5) _____ |
| 6. (a) Have you and your lawyer discussed the possible defenses, if any, to the aggravating Factor(s)(and sentencing points not related to prior convictions)? | (6a) _____ |
| (b) Are you satisfied with your lawyer's legal services? | (6b) _____ |
| 7. (a) Do you understand that you have the right to deny the existence of the aggravating Factor(s)and have a right to be tried by a jury as to the existence of the aggravating facto | (7a) _____ |
| (b) Do you understand that at such trial you would have the right to confront and to cross examine witnesses against you? | (7b) _____ |
| (c) Do you understand that at a jury trial you have the right to have a jury determine the existence of any aggravating factor that may apply to your case beyond a reasonable doubt? | (7c) _____ |
| (d) Do you understand that by your admission you give up these and other valuable constitutional rights related to sentencing? | (7d) _____ |
| 8. Do you understand that following an admission of aggravating factor(s) there are limitations on your right to appeal on these issues? | (8) _____ |

9. Do you understand that you are admitting the existence of the following aggravating factor(s)? (9) _____

File No.	Aggravating Factor /Sentencing Point not related to Prior Conviction	G.S. No	Underlying Offense to which factor(s)/point(s) will be applied	Maximum Punishment
15CRS82162	Defendant had an alcohol concentration of at least 0.15 within a relevant time after driving	20-179(d)(1)	Driving While Impaired	Six (6) months

Total Maximum Punishment Six (6) months

10. Do you now personally admit to the aggravating factor(s) I have just described ? (10)_____

11. Has anyone promised you anything or threatened you in any way to cause you to enter these admissions against your wishes? (11)_____

12. Do you enter these admissions of your own free will, fully understanding what you are doing? (12)_____

13. Do you agree that there is evidence to support these aggravating factors beyond a reasonable doubt? (13)_____

14. Do you agree that the Court may accept your admission to these aggravating factors? (14)_____

15. Do you understand that you are waiving any notice requirement that the State may have with regard to these aggravating factors? (15)_____

16. Do you agree that the State has provided you with appropriate notice about these aggravating factors? (16)_____

17. Do you understand that you will also have the right during a sentencing hearing to prove to the Court the existence of any mitigating factors that may apply to your case? (17)_____

18. Do you have any questions about what has just been said to you or about anything else connected to these admissions? (18)_____

ACKNOWLEDGEMENT BY DEFENDANT

I have read or have heard read all of these questions and understand them. The answers shown are the ones I gave in open court and they are true and accurate. No one has told me to give false answers in order to have the Court accept my admissions in this case. The terms and conditions of this transcript are accurate.

This the ____ day of _____, 20__.

Sworn to and subscriber to before me

This the ____ day of _____, 20__

Signature of Defendant

Signature

Name of Defendant

Title

CERTIFICATION OF LAWYER FOR DEFENDANT

I hereby certify that the terms and conditions stated within this transcript, if any, upon which the defendant's admission was entered are correct and they are agreed to by the defendant and myself. I further certify that I have fully explained to the defendant the nature of the aggravating and sentencing points not related to prior convictions, if any, for sentencing.

This the ____ day of _____, 20__.

Signature of Attorney for Defendant

Name of Attorney for Defendant

CERTIFICATION BY PROSECUTOR

As prosecutor for this Prosecutorial District, I hereby certify that the conditions stated within this transcript, if any, are the terms and conditions agreed to by the defendant and his/her lawyer and myself for the entry of these admissions.

This the ____ day of _____, 20__.

Signature of Prosecutor

Name of Prosecutor

PLEA ADJUCICATION

Upon consideration of the record proper, evidence of the factual presentation offered, answers of the defendant, statements of the lawyer for the defendant, and statements of the prosecutor, the undersigned finds that :

1. There is a factual basis for the entry of the admission as to the aggravating factors.
2. That the defendant is satisfied with his lawyers services.
3. That the defendant is competent to stand trial.
4. That the State has provided the defendant with appropriate notice as to the aggravating factors and/or sentencing points.
5. The admission is the informed choice of the defendant and is made freely, voluntarily and understandingly.

The defendant's admission is hereby accepted by the Court and is ordered recorded.

This the _____ day of _____, 20_____.

Honorable Gary M. Gavenus
Superior Court Judge Presiding

STATE OF NORTH CAROLINA
COUNTY OF _____

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO: _____

STATE OF NORTH CAROLINA

VS.

TRANSCRIPT OF ADMISSION

_____,
DEFENDANT

The undersigned judge, having addressed the defendant personally in open court, finds that the defendant (1) was duly sworn or affirmed, (2) entered an admissions to the existence of three or more prior convictions of impaired driving pursuant to the provisions of N.C.G.S. 20-138.5 and offered the following answers to the questions set out below:

- | | Answer |
|---|---------------|
| 1. Are you able to hear and understand me? | (1) _____ |
| 2. Do you understand that you have the right to remain silent and that any statement you Make may be used against you? | (2) _____ |
| 3. At what grade level can you read and write? | (3) _____ |
| 4. (a) Are you now under the influence of alcohol, drugs, narcotics, medicines, pills, or any other substances? | (4a) _____ |
| (b) When was the last time you used or consumed any such substance? | (4b) _____ |
| 5. Has the existence to the prior convictions of impaired driving been explained to you by your lawyer and do you understand the nature of the these convictions and the potential consequences of these convictions? | (5) _____ |
| 6. (a) Have you and your lawyer discussed the possible defenses, if any, to the prior convictions of impaired driving? | (6a) _____ |
| (b) Are you satisfied with your lawyer's legal services? | (6b) _____ |
| 7. (a) Do you understand that you have the right to deny the existence of the prior convictions and have a right to be tried by a jury as to the existence of the each of the prior convictions as a element of the crime of Habitual Impaired Driving? | (7a) _____ |
| (b) Do you understand that at such trial you would have the right to confront and to cross examine witnesses against you? | (7b) _____ |
| (c) Do you understand that at a jury trial you have the right to have a jury determine the existence of any and all prior convictions of impaired driving that may apply to your case beyond a reasonable doubt? | (7c) _____ |
| (d) Do you understand that by your admission you give up these and other valuable constitutional rights related to trial procedure and sentencing should you be convicted of Driving While Impaired? | (7d) _____ |
| 8. Do you understand that following an admission of the prior impaired driving convictions there are limitations on your right to appeal on these issues? | (8) _____ |
| 9. Do you understand that you are admitting the existence of the following impaired driving | |

convictions?

(9) _____

File No.	Jurisdiction	Date of Offense	G.S. No	Underlying Offense	Date of Conviction

Total Maximum Punishment associated with the admissions is 59 months, with a mandatory minimum active sentence of 12 months.

- 10. Do you now personally admit to the existence of the prior convictions of impaired driving as I have just described ? (10)_____
- 11. Has anyone promised you anything or threatened you in any way to cause you to enter these admissions against your wishes? (11)_____
- 12. Do you enter these admissions of your own free will, fully understanding what you are doing? (12)_____
- 13. Do you agree that there is evidence to support these convictions beyond a reasonable doubt? (13)_____
- 14. Do you agree that the Court may accept your admission to these convictions? (14)_____
- 15. Do you understand that you are waiving any notice requirement that the State may have with regard to these prior convictions? (15)_____
- 16. Do you agree that the State has provided you with appropriate notice about these prior convictions? (16)_____
- 17. Do you understand that you also have the right during a sentencing hearing to prove to the Court the existence of any mitigating factors that may apply to your case? (17)_____
- 18. Do you have any questions about what has just been said to you or about anything else connected to these admissions? (18)_____

ACKNOWLEDGEMENT BY DEFENDANT

I have read or have heard read all of these questions and understand them. The answers shown are the ones I gave in open court and they are true and accurate. No one has told me to give false answers in order to have the Court accept my admissions in this case. The terms and conditions of this transcript are accurate.

This the ____ day of _____, 20____.

Sworn to and subscriber to before me

This the ____ day of _____, 20____

Signature of Defendant

Signature

Name of Defendant

Title

CERTIFICATION OF LAWYER FOR DEFENDANT

I hereby certify that the terms and conditions stated within this transcript, if any, upon which the defendant's admission was entered are correct and they are agreed to by the defendant and myself. I further certify that I have fully explained to the defendant the nature of the prior convictions, if any for both the trial procedure and for sentencing.

This the ____ day of _____, 20__.

Signature of Attorney for Defendant

Name of Attorney for Defendant

CERTIFICATION BY PROSECUTOR

As prosecutor for this Prosecutorial District, I hereby certify that the conditions stated within this transcript, if any, are the terms and conditions agreed to by the defendant and his/her lawyer and myself for the entry of these admissions.

This the ____ day of _____, 20__.

Signature of Prosecutor

Name of Prosecutor

ADMISSION ADJUDICATION

Upon consideration of the record proper, the factual presentation offered, answers of the defendant, statements of the lawyer for the defendant, and statements of the prosecutor, the undersigns finds that:

1. There is a factual basis for the entry of the admissions as to the prior convictions of driving while impaired.
2. That the defendant is satisfied with his lawyer's legal services.
3. That the defendant is competent to stand trial
4. That the admission is the informed choice of the defendant and is made freely, voluntarily and understandingly.

The defendant's admission is hereby accepted by the Court and is ordered recorded.

This the ___ day of _____, 20__.

Signature of Presiding Judge

Name of Presiding Judge

STATE OF NORTH CAROLINA
COUNTY OF _____

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO: _____

STATE OF NORTH CAROLINA

VS.

TRANSCRIPT OF ADMISSION

_____,
DEFENDANT

The undersigned judge, having addressed the defendant personally in open court, finds that the defendant (1) was duly sworn or affirmed, (2) entered an admissions to the existence of aggravating factor(s) (and sentencing points not related to prior convictions) pursuant to the provisions of N.C.G.S. 15A-1340.16 and (3) offered the following answers to the questions set out below:

- | | Answer |
|--|---------------|
| 1. Are you able to hear and understand me? | (1) _____ |
| 2. Do you understand that you have the right to remain silent and that any statement you Make may be used against you? | (2) _____ |
| 3. At what grade level can you read and write? | (3) _____ |
| 4. (a) Are you now under the influence of alcohol, drugs, narcotics, medicines, pills, or any other substances? | (4a) _____ |
| (b) When was the last time you used or consumed any such substance? | (4b) _____ |
| 5. Have the aggravating factors (and sentencing points not related to prior convictions) been explained to you by your lawyer and do you understand the nature of the aggravating factors (and sentencing points not related to prior convictions)? | (5) _____ |
| 6. (a) Have you and your lawyer discussed the possible defenses, if any, to the aggravating factors (and sentencing points not related to prior convictions)? | (6a) _____ |
| (b) Are you satisfied with your lawyer's legal services? | (6b) _____ |
| 7. (a) Do you understand that you have the right to deny the existence of the aggravating factors (and any sentencing points not related to prior convictions)and have a right to be tried by a jury as to the existence of the aggravating factors (and any sentencing points not related to prior convictions)? | (7a) _____ |
| (b) Do you understand that at such trial you would have the right to confront and to cross examine witnesses against you? | (7b) _____ |
| (c) Do you understand that at a jury trial you have the right to have a jury determine the existence of any aggravating factors (and any sentencing points not related to prior convictions) that may apply to your case beyond a reasonable doubt? | (7c) _____ |
| (d) Do you understand that by your admission you give up these and other valuable constitutional rights related to sentencing? | (7d) _____ |
| 8. Do you understand that following an admission of aggravating factors (and any sentencing points not related to prior convictions) there are limitations on your right to appeal on these issues? | (8) _____ |

ACKNOWLEDGEMENT BY DEFENDANT

I have read or have heard read all of these questions and understand them. The answers shown are the ones I gave in open court and they are true and accurate. No one has told me to give false answers in order to have the Court accept my admissions in this case. The terms and conditions of this transcript are accurate.

This the ____ day of _____, 20__.

Sworn to and subscriber to before me

This the ____ day of _____, 20__

Signature of Defendant

Signature

Name of Defendant

Title

CERTIFICATION OF LAWYER FOR DEFENDANT

I hereby certify that the terms and conditions stated within this transcript, if any, upon which the defendant's admission was entered are correct and they are agreed to by the defendant and myself. I further certify that I have fully explained to the defendant the nature of the aggravating and sentencing points not related to prior convictions, if any, for sentencing.

This the ____ day of _____, 20__.

Signature of Attorney for Defendant

Name of Attorney for Defendant

CERTIFICATION BY PROSECUTOR

As prosecutor for this Prosecutorial District, I hereby certify that the conditions stated within this transcript, if any, are the terms and conditions agreed to by the defendant and his/her lawyer and myself for the entry of these admissions.

This the ____ day of _____, 20__.

Signature of Prosecutor

Name of Prosecutor

PLEA ADJUCICATION

Upon consideration of the record proper, evidence of the factual presentation offered, answers of the defendant, statements of the lawyer for the defendant, and statements of the prosecutor, the undersigned finds that :

1. There is a factual basis for the entry of the admission as to the aggravating factors (and//or sentencing points).
2. That the defendant is satisfied with his lawyers services.
3. That the defendant is competent to stand trial.
4. That the State has provided the defendant with appropriate notice as to the aggravating factors and/or sentencing points.
5. The admission is the informed choice of the defendant and is made freely, voluntarily and understandingly.

The defendant's admission is hereby accepted by the Court and is ordered recorded.

This the _____ day of _____, 20_____.

Honorable Gary M. Gavenus
Superior Court Judge Presiding

STATE OF NORTH CAROLINA
COUNTY OF _____

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO: _____

STATE OF NORTH CAROLINA

VS.

TRANSCRIPT OF ADMISSION

_____,
DEFENDANT

The undersigned judge, having addressed the defendant personally in open court, finds that the defendant (1) was duly sworn or affirmed, (2) entered an admissions to the existence of two or more prior convictions of either misdemeanor or felony assault pursuant to the provisions of N.C.G.S. 14-33.2 and offered the following answers to the questions set out below:

- | | Answer |
|--|---------------|
| 1. Are you able to hear and understand me? | (1) _____ |
| 2. Do you understand that you have the right to remain silent and that any statement you Make may be used against you? | (2) _____ |
| 3. At what grade level can you read and write? | (3) _____ |
| 4. (a) Are you now under the influence of alcohol, drugs, narcotics, medicines, pills, or any other substances? | (4a) _____ |
| (b) When was the last time you used or consumed any such substance? | (4b) _____ |
| 5. Has the existence to the prior convictions of misdemeanor or felony assault been explained to you by your lawyer and do you understand the nature of the these convictions and the potential consequences of these convictions? | (5) _____ |
| 6. (a) Have you and your lawyer discussed the possible defenses, if any, to the prior convictions of misdemeanor or felony assault? | (6a) _____ |
| (b) Are you satisfied with your lawyer's legal services? | (6b) _____ |
| 7. (a) Do you understand that you have the right to deny the existence of the prior convictions and have a right to be tried by a jury as to the existence of the each of the prior convictions as a element of the crime of Habitual Misdemeanor Assault? | (7a) _____ |
| (b) Do you understand that at such trial you would have the right to confront and to cross examine witnesses against you? | (7b) _____ |
| (c) Do you understand that at a jury trial you have the right to have a jury determine the existence of any and all prior convictions of assault that may apply to your case beyond a reasonable doubt? | (7c) _____ |
| (d) Do you understand that by your admission you give up these and other valuable constitutional rights related to trial procedure and sentencing should you be convicted of the charge of Simple Assault? | (7d) _____ |
| 8. Do you understand that following an admission of the prior assault convictions there are limitations on your right to appeal on these issues? | (8) _____ |
| 9. Do you understand that you are admitting the existence of the following misdemeanor | |

or felony assault convictions?

(9) _____

File No.	Jurisdiction	Date of Offense	G.S. No	Offense	Date of Conviction

Total possible Maximum Punishment associated with the admissions is 39 months, in the event the defendant is convicted of the underlying offense of simple assault.

10. Do you now personally admit to the existence of the prior convictions of misdemeanor or felony assault as I have just described ? (10)_____

11. Has anyone promised you anything or threatened you in any way to cause you to enter these admissions against your wishes? (11)_____

12. Do you enter these admissions of your own free will, fully understanding what you are doing? (12)_____

13. Do you agree that there is evidence to support these convictions beyond a reasonable doubt? (13)_____

14. Do you agree that the Court may accept your admission to these convictions? (14)_____

15. Do you understand that you are waiving any notice requirement that the State may have with regard to these prior convictions? (15)_____

16. Do you agree that the State has provided you with appropriate notice about these prior convictions? (16)_____

17. Do you understand that you also have the right during a sentencing hearing to prove to the Court the existence of any mitigating factors that may apply to your case? (17)_____

18. Do you have any questions about what has just been said to you or about anything else connected to these admissions? (18)_____

ACKNOWLEDGEMENT BY DEFENDANT

I have read or have heard read all of these questions and understand them. The answers shown are the ones I gave in open court and they are true and accurate. No one has told me to give false answers in order to have the Court accept my admissions in this case. The terms and conditions of this transcript are accurate.

This the ____ day of _____, 20____.

Sworn to and subscriber to before me

This the ____ day of _____, 20____

Signature of Defendant

Signature

Name of Defendant

Title

CERTIFICATION OF LAWYER FOR DEFENDANT

I hereby certify that the terms and conditions stated within this transcript, if any, upon which the defendant's admission was entered are correct and they are agreed to by the defendant and myself. I further certify that I have fully explained to the defendant the nature of the prior convictions, if any for both the trial procedure and for sentencing.

This the ____ day of _____, 20__.

Signature of Attorney for Defendant

Name of Attorney for Defendant

CERTIFICATION BY PROSECUTOR

As prosecutor for this Prosecutorial District, I hereby certify that the conditions stated within this transcript, if any, are the terms and conditions agreed to by the defendant and his/her lawyer and myself for the entry of these admissions.

This the ____ day of _____, 20__.

Signature of Prosecutor

Name of Prosecutor

ADMISSION ADJUDICATION

Upon consideration of the record proper, the factual presentation offered, answers of the defendant, statements of the lawyer for the defendant, and statements of the prosecutor, the undersigns finds that:

1. There is a factual basis for the entry of the admissions as to the prior convictions of misdemeanor or felony assault.
2. That the defendant is satisfied with his lawyer's legal services.
3. That the defendant is competent to stand trial
4. That the admission is the informed choice of the defendant and is made freely, voluntarily and understandingly.

The defendant's admission is hereby accepted by the Court and is ordered recorded.

This the ___ day of _____, 2014.

Signature of Presiding Judge

Name of Presiding Judge