

## Appendix C

### SURVEY OF STRUCTURED SENTENCING CASE LAW

The following is a survey of cases from the North Carolina Supreme Court and the Court of Appeals which includes rulings pertaining to offenses committed under the Structured Sentencing Act. This survey includes published opinions dating from the enactment of structured sentencing in 1994 to December 1, 2004. The cases should be read in their entirety before being cited as authority.

#### SECTION I: IMPOSING SENTENCES FOR FELONIES

##### **Step 1: Determine the offense class for each felony conviction.**

**State v. Poston, \_\_ N.C. App. \_\_, 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 the defendant would be a Class B1 felon with a term of months (rather than life), the doubt should be resolved against the harsher sentence.

##### **Step 2: Determine the prior record level for the offender.**

###### ***A. Counting prior record points***

**State v. Harrison, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (6 July 2004)**: Defendant was convicted of failure to register as a sex offender under N.C.G.S. 14-208.11. The trial court assigned prior record points for the second-degree rape conviction that made the defendant a sex offender. Defendant appealed claiming the second-degree rape offense was an element of the current offense and including it in the prior record level calculation would subject him to double jeopardy. The Court of Appeals affirmed the trial court decision stating that failure to register as a sex offender is a separate crime and that the second-degree rape conviction is not an element of the offense.

**State v. Scercy, 159 N.C. App. 344, 583 S.E.2d 339 (2003)**: The trial court assigned one prior record point for a prior financial card fraud conviction. The Court of Appeals remanded for resentencing pointing out that the classification of a prior offense is the classification for that offense at the time the offense for which the defendant is being sentenced is committed. At the time the defendant committed the current offense, financial card fraud was only a Class 2 misdemeanor. Class 2 misdemeanors are not assigned any points.

**State v. Tucker, 154 N.C. App. 653, 573 S.E.2d 197 (2002)**: The defendant was in a youth

development center at the time of the offenses. The trial court found that the offenses were committed while defendant was serving a sentence of imprisonment and assigned one prior record point. The Court of Appeals reversed holding that commitment of a juvenile to the Department of Juvenile Justice for placement in a youth development center is not the same as a sentence of imprisonment.

**State v. Gentry, 135 N.C. App. 107, 519 S.E.2d 68 (1999)**: In calculating defendant's prior record level, the trial court counted three prior driving while impaired convictions which were relied upon to establish defendant's habitual driving while impaired status. Relying on the laws concerning habitual felons and calculation of their prior record level, the Court held that the driving while impaired convictions used to establish the habitual driving while impaired offense could not also be used to calculate defendant's prior record level for sentencing purposes.

**State v. Vaughn, 130 N.C. App. 456, 503 S.E.2d 110 (1998), *aff'd*, 350 N.C. 88, 511 S.E.2d 638 (1999) (per curiam)**: The trial court counted a prior breaking and entering conviction for which defendant was found to be an habitual felon as a Class C felony instead of a Class H felony in determining defendant's prior record level. The Court of Appeals reversed holding that "habitual felon" is a status, not a felony, and that the prior Class H felony conviction for breaking and entering must be used to calculate his prior record level.

**State v. Rich, 130 N.C. App. 113, 502 S.E.2d 49 (1998)**: The trial 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. The Court of Appeals upheld the trial court stating that there is no statute of limitation on the use of prior convictions to determine prior record level.

**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 kidnaping conviction as second degree kidnaping. Defendant appealed, arguing that common law kidnaping had been abolished and that, when it was in effect, it was classified as a misdemeanor. The Court of Appeals upheld, basing its decision on both the legislative intent behind the Structured Sentencing Act and the plain language of the Act itself. Noting that the intent of the Act was to provide more severe punishment for recidivists, the Court held it would be contrary to legislative intent not to include the prior conviction. In determining how to count the prior offense, the Court relied on N.C.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, then the Court must find a substantially similar crime for which classification may be assigned. Using this principle, the Court found that the trial court properly reviewed the common law kidnaping conviction and determined that it most closely resembled the current offense of second degree kidnaping.

**State v. Leopard, 126 N.C. App. 82, 483 S.E.2d 469 (1997)**: In determining his prior record level, the trial court assessed defendant one point for being on probation for a driving while impaired conviction at the time the current offense was committed. The Court of Appeals, relying on the plain language of N.C.G.S. 15A-1340.14(7), affirmed holding that if the current offense is committed while the defendant is on probation, a point is added to the prior record

calculation; it is irrelevant that the prior conviction which resulted in probation is for an offense which does not count in the calculation of prior record level.

**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 another prior conviction which was used to establish defendant's habitual felon status. The Court of Appeals upheld the trial court stating that where prior offenses have been consolidated for judgment, each prior conviction still stands; one can be used to establish habitual felon status while the other can be used in the calculation of defendant's prior record level.

**State v. Bethea, 122 N.C. App. 623, 471 S.E.2d 430 (1996)**: In determining defendant's prior record level, the trial court assigned defendant two additional points. One point was added because all the elements of the present offense were included in a prior conviction. A second point was assessed based on defendant's current probation status. Each of these underlying prior offenses was also used to establish defendant's habitual felon status. The Court of Appeals affirmed the trial court. Relying on N.C.G.S. 15A-1340.14(b)(6) and (b)(7), the Court held that the assigning of additional points addresses the timing and nature of the offense for which the defendant is now being sentenced, rather than the mere existence of a prior offense. Therefore, the prohibition against double counting a prior conviction to determine habitual felon status and prior record level has not been violated.

#### ***B. Definition of prior conviction***

**State v. Bidgood, 144 N.C. App. 267, 550 S.E.2d 198 (2001)**: Defendant was sentenced in Prior Record Level V. One of the prior convictions was subsequently overturned on appeal. The Court of Appeals reversed holding that defendant was entitled to resentencing where one of the prior convictions for a felony offense used to determine his prior record level at the original sentencing hearing had subsequently been overturned on appeal. Absent that prior conviction, defendant falls into Prior Record Level IV instead of Prior Record Level V. The Court stated that despite the fact that N.C.G.S. 15A-1340.11(7) indicates that a prior conviction exists when the defendant has been previously convicted of a crime in superior court regardless of whether the conviction is on appeal, not resentencing defendant under these circumstances would be unjust.

**State v. Reaves, 142 N.C. App. 629, 544 S.E. 2d 253 (2001)**: In calculating the defendant's prior record level, the trial court included as a prior conviction a 1994 adjudication of criminal contempt. The Court of Appeals reversed holding that defendant's criminal contempt conviction was 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 upheld the trial court. Citing N.C.G.S. 15A-1331(b), the Court stated 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 N.C.G.S. 90-96(a). North Carolina General Statute 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 because defendant had pled guilty to the prior offense and that conviction had not been dismissed because defendant had not completed probation prior to the new offense.

### ***C. Considering multiple prior convictions***

**State v. Wilkins, 128 N.C. App. 315, 494 S.E.2d 611 (1998)**: The trial court assessed two separate prior record points for Class 1 misdemeanors of which defendant had been convicted in District Court on separate days but which defendant argued had been remanded following withdrawal of appeal and judgment entered on the same day during the same session of court. In affirming the trial court's action, the Court of Appeals held that for purposes of calculating prior record level, where a conviction in District Court is appealed and then subsequently the appeal is withdrawn, the conviction occurs on the date that the defendant was originally convicted 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 counted convictions which were from the same session of court and which were consolidated with prior convictions used to establish defendant's habitual felon status. The Court of Appeals held that even though N.C.G.S. 14-7.6 prohibits using the same conviction to establish both habitual felon status and prior record level and N.C.G.S. 15A-1340.14(d) prohibits the use of more than one conviction obtained in a single calendar week to increase the defendant's prior record level, nothing in the statutes prohibits the trial court from using one conviction obtained in a single calendar week of court to establish habitual felon status and using another separate conviction obtained during that same week to determine the prior record level.

### ***D. Proof of prior convictions***

**State v. Alexander, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (16 November 2004)**: Defendant pled guilty to assault with a deadly weapon with intent to kill inflicting serious injury pursuant to a plea agreement providing that "the State will agree that the defendant be sentenced to a minimum of 80 months and a maximum of 105 months." The prosecutor provided the court with a prior record level worksheet that assigned one point for a prior misdemeanor conviction but did not provide any supporting evidence. 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 defendant appealed claiming the State failed to prove his prior convictions. The Court of Appeals held that defense counsel's statement did not amount to a stipulation as to defendant's prior record agreeing to the sentence length did not render the issue moot. The case was remanded for resentencing.

**State v. Bartley, 156 N.C. App. 490, 577 S.E.2d 319 (2003)**: Defendant was sentenced as a prior record level IV based upon an unsupported statement by the prosecutor, “in this case the defendant has 11 prior sentencing points, placing him at prior Record Level 4.” The Court of Appeals remanded for resentencing. The defendant’s prior record was not stipulated to or proven through copies of records. Such a statement, even if uncontested, does not meet the State’s burden of proof as required by N.C.G.S. 15A-1340.14(f).

**State v. Smith, 155 N.C. App. 500, 573 S.E.2d 618 (2002)**: The trial court sentenced defendant based on a prior record level worksheet submitted by the district attorney without further documentation or stipulation by defendant. Relying on State v. Goodman, 149 N.C. App. 57, 560 S.E.2d 196 (2002), the Court of Appeals held that the State failed to prove defendant's prior record level by a preponderance of the evidence. The State must offer into evidence documentation to prove defendant's prior record level.

**State v. Eubanks, 151 N.C. App. 499, 565 S.E.2d 738 (2002)**: In calculating the 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. Immediately prior to the State’s submission of the worksheet, the defendant’s attorney was presented with the worksheet and he 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 the defendant’s attorney were reasonably construed as a stipulation by the defendant that he had been convicted of the charges listed on the worksheet.

**State v. Goodman, 149 N.C. App. 57, 560 S.E.2d 196 (2002), reversed in part 357 N.C. 43, 577 S.E.2d 619 (2003)**: At trial, the State submitted its prior record level worksheet to the court but did not submit the printout of prior convictions. The Court of Appeals held that the State failed to prove by a preponderance of the evidence that defendant was the same person convicted of the prior crimes listed on his prior record level worksheet and that the trial court made no findings regarding the reliability of the information provided by the State. The law requires more than the State's unverified assertion that a defendant was convicted of the prior crimes listed on a prior record level worksheet.

**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 had sufficient identifying information, such as defendant’s fingerprint identifier number and FBI number, to give it the indicia of reliability so that it could be used to establish defendant’s prior record.

**State v. Hamby, 129 N.C. App. 366, 499 S.E.2d 195 (1998)**: Defendant entered a guilty plea pursuant to a transcript of plea that expressly included the following: “Charge is Class E felony and defendant has a record level of II. The defendant will receive a sentence of 29 months minimum.--44 months maximum.” The Court of Appeals held that by admitting that her prior record level was 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.”

### ***E. Prior record from other jurisdictions***

**State v. Morgan, \_\_ N.C. App. \_\_, 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 the defendant was convicted. Therefore, the State failed to show that the 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.

**State v. Hanton, 140 N.C. App. 679, 540 S.E.2d 376 (2000)**: The prosecutor presented a prior record level worksheet and a computer printout listing the defendant’s prior out-of-state convictions. Defendant did not disagree as to the convictions. The trial court assigned prior record points based on the classification of substantially similar offenses in North Carolina. The Court of Appeals held that a defendant may stipulate that out-of-state offenses are substantially similar to corresponding North Carolina offenses but that he did not do so in this case. Absent a stipulation, the State must prove by a preponderance of the evidence that the out-of-state felony convictions are substantially similar to North Carolina offenses that are classified as Class I felonies or higher, or else the trial court must classify the out-of-state convictions as Class I felonies for sentencing purposes.

**State v. Rich, 130 N.C. App. 113, 502 S.E.2d 49 (1998)**: The trial court compared statutes from other jurisdictions to North Carolina statutes to determine how to count defendant’s prior convictions from outside North Carolina. In upholding the trial court, the Court of Appeals found that the trial court could establish by comparison that defendant’s prior convictions from other states were for offenses substantially similar to offenses classified as felonies in North Carolina. Therefore, the convictions from other jurisdictions could be assigned the same number of prior record points as the similar North Carolina offenses pursuant to N.C.G.S. 15A-1340.14(e).

## **Step 3: Consider Aggravating and Mitigating factors.**

### ***A. Burden of proof***

**State v. Allen, \_\_ N.C. App. \_\_, 601 S.E.2d 299 (2004)**: The trial court found aggravating factors present based on a preponderance of the evidence and sentenced the defendant in the aggravated range. The defendant filed a motion for appropriate relief arguing that the trial court's imposition of a sentence in the aggravated range (the offense was especially heinous, atrocious and cruel) was done in violation of the Sixth Amendment to the U.S. Constitution and Blakely

v. Washington, \_\_\_ U.S. \_\_\_, 159 L. Ed. 2d 403 (2004). In Blakely, the U.S. Supreme Court held that a trial court alone may not impose a sentence in excess of the “statutory maximum,” unless either a jury’s verdict finds that additional facts, or aggravating circumstances, warrant an increased sentence, or the defendant has waived his Sixth Amendment right to trial by jury. The Court of Appeals held that the reasoning of Blakely applies to N.C.G.S. 15A-1340.16.

**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 factor was based solely on the prosecutor’s statement that the victim was currently receiving counseling. The Court of Appeals remanded the case for re-sentencing, finding that an aggravating factor cannot be based solely upon an assertion by the prosecutor.

**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 the defendant. The Court of Appeals held that the trial court is required to find a mitigating factor only where the evidence presented in support of the factor is “substantial, uncontradicted, and manifestly credible”; the defendant failed to meet this burden; therefore, the trial court did not err in not finding any factors in mitigation.

### ***B. Aggravating and Mitigating factors***

**State v. Harris, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E. 2d \_\_\_ (5 October 2004)**: Defendant was found guilty of common law robbery and second degree rape. The trial court found the non-statutory aggravating factor that “defendant is a predator” (N.C.G.S. 15A-1340.16(d)(20)). The Court of Appeals held that the term “predator,” as related to sex offenses, is a specifically defined legal classification under N.C.G.S. 14-208.6(6) and was used improperly as a non-statutory aggravating factor.

**State v. Harrison, \_\_\_ N.C. App. \_\_\_, 596 S.E.2d 834 (2004)**: Defendant pled guilty to multiple counts, including assault with a deadly weapon on a government official and fleeing to elude arrest in a motor vehicle. Since defendant was an habitual felon, all counts were class C felonies. The trial court consolidated all convictions into one judgment, and found as aggravating factors that (1) defendant created a great risk of danger to more than one person (N.C.G.S. 15A-1340.16(d)(8)) and (2) the offense was committed for the purpose of preventing a lawful arrest (N.C.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. The Court of Appeals affirmed, holding that where multiple offenses are equally classified, the consolidated judgment can be aggravated by any factor that is an element of one, but not all, of the offenses.

**State v. Boyd, \_\_\_ N.C. App. \_\_\_, 595 S.E.2d 697 (2004)**: Defendant had engaged in selling cocaine, getting a 13 year-old boy to actually make the transaction. Defendant was convicted of conspiracy to sell a controlled substance, but he was acquitted of contributing to the delinquency of a juvenile. In sentencing the defendant, the trial court found, as an aggravating factor, that the defendant had involved a person under the age of 16 in the commission of a crime (N.C.G.S.

15A-1340.16(d)(13)). On appeal, the Court of Appeals quoted State v. Marley, 321 N.C. 415, 364 S.E.2d 133 (1987), recognizing that once a defendant has been acquitted of a crime, he is considered free from accusation or suspicion of guilt. Thus the trial court cannot use at sentencing an essential element of a crime for which the defendant was acquitted. In this case, however, simply because the jury acquitted defendant of contributing to the delinquency of a juvenile does not mean that they found that the boy was not a juvenile. Ample evidence existed for the court to find that the boy was under 16, thus establishing the aggravating factor.

**State v. Beck, \_\_ N.C. App. \_\_, 594 S.E.2d 94 (2004)**: 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 (N.C.G.S. 15A-1340.16(d)(12)), and that the defendant was a fugitive from Florida (N.C.G.S. 15A-1340.16(d)(20)). The Court of Appeals remanded for resentencing, pointing out that, statutorily, the same evidence may not be used to support more than one aggravating factor.

**State v. Robertson, 161 N.C. App. 288, 587 S.E.2d 902 (2003)**: Upon conviction for malicious conduct by a prisoner, defendant appealed the finding of an aggravating factor that he committed the offense “to hinder the lawful exercise of a governmental function or the enforcement of laws.” (N.C.G.S. 15A-1340.16(d)(5)) The Court of Appeals upheld the trial court’s decision, noting that malicious conduct by a prisoner only requires a general intent directed towards a guard, and the conduct may not have been intended to hinder the guard in his or her function; the aggravating factor, however, required a specific intent to hinder a governmental function. The defendant also appealed the use of a non-statutory aggravating factor (“the defendant breached his assurance of good behavior [in court]” (N.C.G.S. 15A-1340.16(d)(20)), since he had already been convicted of contempt of court. The Court of Appeals found no error, since the contempt conviction was based on the defendant overturning a table and shouting expletives, and the breach of assurance factor was based on his feigning heart problems.

**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 (N.C.G.S. 15A-1340.16(d)(15)). The Court of Appeals could find 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. Thus the Court found that aggravating factor 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 (N.C.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. Sellers, 155 N.C. App. 51, 574 S.E.2d 101 (2002):** The 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 aggravating factors 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 (N.C.G.S. 15A-1340.16(d)(8)), and that defendant committed the offense while on pretrial release (N.C.G.S. 15A-1340.16(d)(12)). The Court of Appeals held that the trial court properly found the first aggravating factor because the State provided additional evidence beyond that required for the underlying offenses which supported the aggravating factor. The Court of Appeals reversed the trial court's finding on the second aggravating factor holding that proof of arrest and absence of proof that a trial occurred is not sufficient evidence to conclude defendant was on pretrial release.

**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 as aggravating factors that the offense involved the actual taking of property of great monetary value (N.C.G.S. 15A-1340.16(d)(14)) and defendant took advantage of a position of trust or confidence to commit the offense (N.C.G.S. 15A-1340.16(d)(15)). The trial court also found as the sole mitigating factor that defendant had accepted responsibility for his criminal conduct (N.C.G.S. 15A-1340.16(e)(15)). The Court of Appeals found that the evidence supported the finding that defendant took advantage of a position of trust or confidence; however, in one case the evidence supported a charge of embezzlement rather than obtaining property by false pretenses. Proof of embezzlement involves proof of a position of trust and the evidence used to support an element of the crime cannot also support an aggravating factor.

**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 trial court found aggravating and mitigating factors, including the non-statutory aggravating factor that the victims were asleep which made their condition "more vulnerable and susceptible to injury or victimization." The trial court further found that "each and every aggravating factor outweighed all mitigating factors" and therefore "each aggravating factor was of a sufficient basis for the imposition of a sentence in the aggravated range." The Court of Appeals held that the weighing of aggravating and mitigating factors is within the discretion of the trial court. The Court also held that the trial court properly aggravated defendant's sentences on the grounds the victims were asleep because it made them more vulnerable and susceptible to injury or victimization. Finally, the Court held that the trial court properly failed to find the mitigating factor that defendant accepted responsibility for his criminal conduct based solely on his apology in court.

**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 a non-statutory aggravating factor described as, "evidence that the 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.” North Carolina General Statute 15A-1340.16(d)(20) requires that non-statutory aggravating factors must be reasonably related to the purposes of sentencing and the Court of Appeals held that this factor was not reasonably related.

**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 (N.C.G.S. 15A-1340.16(d)(14)). The Court of Appeals found no error on the part of the trial court in finding the aggravating factor since the amount of monetary damages sustained is not an element of the offense charged.

**State v. Demos, 148 N.C. App. 343, 559 S.E.2d 17 (2002):** The trial court found defendant guilty 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 sentence for each homicide with his conviction of the other homicide on the basis that each was part of a course of conduct in which he killed the other victim. The Court of Appeals upheld the trial court’s decision. Relying on State v. Ruff, 349 N.C. 213, 505 S.E.2d 579 (1998), the Court stated that structured sentencing allows a sentence to be aggravated by evidence necessary to prove elements of contemporaneous convictions provided the evidence is not also necessary to prove the underlying conviction.

**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 trial court found the non-statutory aggravating factor that defendant had provided alcohol to the "children" who were the victims. The Court of Appeals upheld the trial court by stating that the offense of taking indecent liberties with a child requires a showing that the victim was under the age of sixteen while the aggravating factor did not require that evidence.

**State v. Smarr, 146 N.C. App. 44, 551 S.E.2d 881 (2001):** Defendant was sixteen years old and was 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 sixteen in the crime (N.C.G.S. 15A-1340.16(d)(13)). The Court of Appeals upheld the decision of the trial court by indicating that it could not infer any legislative intent to impose a requirement of any specific age difference between the defendant and the person under age sixteen he involves in the crime.

**State v. Hilbert, 145 N.C. App. 440, 549 S.E.2d 882 (2001):** Defendant was convicted of first degree burglary for entering the home of the victims, which included two young children. The trial court found as an aggravating factor that the victim was very young (N.C.G.S. 15A-1340.16(d)(11)). The trial court failed to find as a mitigating factor that defendant had completed a drug treatment program while awaiting trial (N.C.G.S. 15A-1340.16(e)(16)) even though a certificate verifying successful completion of the program was handed to the trial court, no

objection was made by the State, and no evidence to the contrary was presented. The Court of Appeals found that the trial court erred when it found the young age of the victim as an aggravating factor because there was no evidence that defendant targeted the victims' home because of the presence of young children, that he knew the age of the occupants before breaking into the residence, that he entered the children's rooms, or that they were aware that he was in the house. The Court also found that the trial court erred when it failed to find a mitigating factor after presentation of evidence in support of that factor which was uncontradicted, substantial and credible.

**State v. Wampler, 145 N.C. App. 127, 549 S.E.2d 563 (2001):** Defendant was convicted of assault with a deadly weapon inflicting serious injury with intent to kill. The trial court found as an aggravating factor that the victim suffered from a serious injury that is permanent and debilitating (N.C.G.S. 15-1340.16(d)(19)). The Court of Appeals held that because the injury to the victim went beyond that which would be necessary to convict defendant of the offense, that evidence of the victim's injuries could be used to aggravate the sentence.

**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 by finding as an aggravating factor that the defendant committed these crimes because of this victim's race (N.C.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 the defendant's motivation for his attacks on the other victims is irrelevant in determining whether the attack on this victim was racially motivated. Since the State introduced evidence that this victim was singled out because he was black, the trial court's sentence was proper. Defendant also 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 (N.C.G.S. 15A-1340.16(d)(7)) since that aggravating factor was not supported by the evidence or applicable legal authorities. The Court of Appeals found no error on the part of the trial court, holding that the trial court correctly focused on whether the facts of the case disclosed excessive brutality, or physical pain, psychological suffering, or dehumanizing aspects not normally present in that offense.

**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 (N.C.G.S. 15A-1340.16(d)(14)), even though there was no evidence that the assault resulted in damage to the victim's property, and failed to find as a mitigating factor that the defendant voluntarily acknowledged wrongdoing in connection with the offense (N.C.G.S. 15A-1340.16(e)(11)). The Court of Appeals reversed holding that monetary loss must result from damage to property. The Court upheld the trial court's failure to find the mitigating factor stating that the evidence presented did not amount to

an admission of culpability, responsibility or remorse, as well as guilt for the shooting.

**State v. Hendricks, 138 N.C. App. 668, 531 S.E.2d 896 (2000)**: The defendant was convicted of larceny and the trial court found the aggravating factor that the offense involved the taking of property of great monetary value. Defendant's 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, and the defendant did not rebut the statement made in the summary of facts.

**State v. Fuller, 138 N.C. App. 481, 531 S.E.2d 861, (2000), *disc. review denied*, 353 N.C. 271, 546 S.E.2d 120 (2000)**: The defendant was driving while impaired and caused the death of two people. The trial court found defendant guilty of two counts of second-degree murder. The trial court found the aggravating factor that defendant 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 (N.C.G.S. 15A-1340.16(d)(8)). The Court of Appeals upheld the finding of the trial court 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 a finding of that aggravating factor.

**State v. Crockett, 138 N.C. App. 109, 530 S.E.2d 359 (2000), *disc. review denied*, 352 N.C. 593, 544 S.E.2d 790 (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 (N.C.G.S. 15A-1340.16(d)(15)). 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. Rudisill, 137 N.C. App. 379, 527 S.E.2d 727 (2000)**: The trial court found defendant guilty of taking indecent liberties with children. The trial court used the victim's age as an aggravating factor but the State did not present evidence that the victim was more vulnerable than other victims because of his age. The Court of Appeals vacated defendant's sentence and remanded the case for a new sentencing hearing, holding that there was no finding that the victim was more vulnerable simply because of his age.

**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. The trial court found as an aggravating factor that the offenses were committed against the victims because of their race, color, religion, or country of origin (N.C.G.S. 15A-1340.16(d)(17)). Defendant argued on appeal that this aggravating factor only applies when the defendant has some animosity against the victim because of the victim's race or nationality. The Court of Appeals upheld the decision of the trial court, finding no language in the statute requiring the defendant harbor animosity toward the victim's race or ethnic group.

**State v. Hughes, 136 N.C. App. 92, 524 S.E. 2d 63 (1999)**: In sentencing the defendant for the conviction of felony accessing computers, the trial court found the great monetary loss to the victim (N.C.G.S. 15A-1340.16(d)(14)) to be an aggravating factor. The Court of Appeals held that this evidence is not necessary to prove an element of the offense, and therefore, such evidence may be used to aggravate the sentence.

**State v. Burgess, 134 N.C. App. 632, 518 S.E.2d 209 (1999)**: The defendant was convicted of felony child abuse and the trial court found the victim's young age to be an aggravating factor (N.C.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 holding that the fact that the victim was very young was not an element necessary to prove felony child abuse. To sustain a charge of felony child abuse, it must only be proved that the victim is less than 16 years old. This aggravating factor took into account the child's vulnerability due to her especially young age.

**State v. Rollins, 131 N.C. App. 601, 508 S.E.2d 554 (1998)**: On its own motion, the trial court found as a non-statutory aggravating factor that defendant attempted to dispose of evidence by transferring the gun to another individual immediately after the crime. Defendant argued that a finding of this factor under the circumstances of this case violated his Fifth Amendment right against self-incrimination. The Court of Appeals reversed, holding that defendant's actions did not rise to the level of misconduct sufficient to outweigh the constitutional protection against self-incrimination. The Court based its decision on the absence of evidence that the defendant was actively trying to elude law enforcement. The Court further held that a trial court may find non-statutory aggravating factors not requested by the State whether evidence supporting such factors is presented at trial or at the sentencing hearing, but that the trial court should exercise restraint when considering such factors.

**State v. Mullaney, 129 N.C. App. 506, 500 S.E.2d 112 (1998)**: The trial court found as an aggravating factor that defendant violated a position of trust in committing the offense (N.C.G.S. 15A-1340.16(d)(15)). The Court of Appeals reversed, holding that because a violation of a position of trust was an element of the offense of embezzlement, the trial court could not also find this to be an aggravating factor.

**State v. Taylor, 128 N.C. App. 394, 496 S.E.2d 811 (1998)**: The trial court found as an aggravating factor that defendant had a prior delinquency adjudication for second degree rape. Defendant argued that N.C.G.S. 15A-1340.16(d)(18a), which permits the consideration of this factor, was unconstitutionally applied to him because it was not in existence at the time of defendant's delinquency adjudication. Affirming the trial court, the Court of Appeals held that consideration of the prior juvenile adjudication did not violate defendant's constitutional rights. The Court held that N.C.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. The Court held that 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

defendant had a full hearing as to his delinquency at the time of the adjudication.

**State v. Ballard, 127 N.C. App. 316, 489 S.E.2d 454 (1997), *rev'd per curiam in part and disc. rev. improvidently allowed in part*, 349 N.C. 286, 507 S.E.2d 38 (1998)**: The trial court found as an aggravating factor that defendant took advantage of a position of trust or confidence to commit the offense. In affirming per curiam the dissenting opinion of the Court of Appeals, the Supreme Court held that the mere existence of a relationship of trust between the defendant and the victim is not sufficient to support this aggravating factor; the evidence must show that defendant relied upon the relationship to facilitate commission of the crime.

**State v. Deese, 127 N.C. App. 536, 491 S.E.2d 682 (1997)**: The trial court did not find as a mitigating factor that defendant had acted under extreme provocation (N.C.G.S. 15A-1340.16(e)(1)) where evidence supporting such a finding was presented at trial but not at the sentencing hearing. The Court of Appeals held that only if the defendant proves by uncontradicted evidence that he acted under circumstances constituting strong provocation must the trial court consider this factor in mitigation of his sentence. Further, where the evidence shows that the defendant has time or opportunity to “cool his blood” (as in this case) the trial court is not required to find provocation. The trial court did find the victim’s old age to be an aggravating factor. The Court of Appeals reversed holding that the aggravating factor focuses on whether as a result of his or her age the victim was especially vulnerable to the crime. The age of the victim alone, with no proof that his age made him more vulnerable to victimization, was not sufficient to find this aggravating factor.

**State v. Applewhite, 127 N.C. App. 677, 493 S.E.2d 297 (1997)**: The defendant was convicted of attempted armed robbery and assault with a deadly weapon inflicting serious injury. The trial court found the non-statutory aggravating factor that defendant left the victim without making any effort to save his life. Defendant argued that evidence used to support this factor was necessary to prove an element of the crimes for which he was convicted and that it should not have been used to enhance his sentence. The Court of Appeals held that evidence used to prove this factor was not necessary to prove either of the offenses of which defendant was convicted, and therefore, the trial court did not err in finding this non-statutory aggravating factor. Defendant also contended that the trial court should have found as a mitigating factor that he has a support system in the community despite the fact that defendant did not request this factor be found at the sentencing hearing. The Court of Appeals held that the evidence in support of this mitigating factor was not sufficient to mandate the trial court’s finding.

**State v. Crisp, 126 N.C. App. 30, 483 S.E.2d 462 (1997)**: The 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 the following aggravating factors: the victims suffered permanent and debilitating serious injuries (N.C.G.S. 15A1340.16(d)(19)), and the defendant used a weapon which normally would be hazardous to the lives of more than one person (N.C.G.S. 15A-1340.16(d)(8)). On appeal, defendant argued that these factors had been necessary to prove an element of the offense for which he was convicted and as such could not be used in sentencing him in the aggravated range. The Court

of Appeals held that a distinction exists between the elements of the offense (that defendant inflicted serious injury and that he used a deadly weapon) and the specific circumstance of the offense which the aggravating factors seek to punish (that the injury inflicted is permanent and debilitating and that the deadly weapon used, in this case a semi-automatic weapon, is by design hazardous to more than one person).

### ***C. Requirement to provide written reasons***

**State v. Knott, \_\_ N.C. App. \_\_, 595 S.E.2d 172 (2004)**: Once the verdict was read, the trial court immediately sentenced the defendant without allowing her to present evidence of mitigating factors. The Court of Appeals remanded for resentencing, holding that although the trial court does not need to 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 still needs to consider evidence of mitigating and aggravating circumstances brought forth by the parties, even if a presumptive sentence is ultimately imposed (State v. Kemp, 153 N.C. App. 231, 569 S.E.2d 717, *disc. review denied*, 356 N.C. 441, 573 S.E.2d 158 (2002)). To fail to do so “would constitute a miscarriage of justice.”

**State v. Ramirez, 156 N.C. App 249, 576 S.E.2d 714 (2003)**: The defendant offered a mitigating factor but the trial court did not make any findings as to the factor and sentenced the defendant from the presumptive range. The Court of Appeals held that since the court may, in its discretion, sentence the defendant within the presumptive range without making findings regarding proposed mitigating factors, the trial court did not err by sentencing defendant within the presumptive range without making findings as to this mitigating factor.

**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 the defendant within the presumptive range. The Court of Appeals held that judges have the discretion to impose a sentence within the mitigated range, and likewise have the discretion to decline to do so and sentence within the presumptive range.

**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. Chavis, 141 N.C. App. 553, 540 S.E.2d 404 (2000)**: The defendant offered evidence supporting mitigating factors but the trial court did not take it into account and sentenced from the presumptive range. The Court of Appeals upheld the decision of the trial court, finding that the trial court was required to take into account factors in aggravation and mitigation only when deviating from the presumptive range.

**State v. Brooks, 136 N.C. App. 124, 523 S.E.2d 704 (1999)**: The trial court sentenced defendant within the presumptive range. Defendant argued that the trial court should have found

that certain mitigating factors existed. Relying on State v. Rich, 132 N.C. App. 440, 512 S.E.2d 441 (1999), the Court of Appeals held that because the trial court sentenced defendant within the presumptive guidelines for his offense, it did not have to make any findings of mitigating or aggravating factors.

**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 the requirement that written findings be made as to why a defendant is sentenced outside of the presumptive range even in cases in which there has been a plea agreement.

**State v. Campbell, 133 N.C. App. 531, 515 S.E.2d 732 (1999)**: Presented with several mitigating and no aggravating factors, the trial court sentenced the defendant within the presumptive range. Upholding the trial court, the Court of Appeals held that the trial judge is not required to justify a sentencing decision within the presumptive range, and need not make findings of mitigating or aggravating factors.

**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 made no findings in mitigation despite what defendant on appeal described as conclusive evidence in support of mitigating factors. The Court of Appeals held that because the trial court sentenced within the presumptive range, there was no requirement that the judge make findings of mitigating or aggravating factors.

**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 when imposing sentences 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.

#### **Step 4: Select a Minimum Sentence from the Sentence Range.**

##### ***A. Firearm Enhancement***

**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):** Defendant was convicted of first-degree burglary and second-degree kidnapping. Defendant’s sentences were enhanced using the firearm enhancement provision of N.C.G.S. 15A-1340.16A, adding sixty months to the minimum sentence for the first-degree burglary offense and to the minimum sentence for the second-degree kidnapping offense. The Supreme Court held that, where the State seeks an enhanced sentence pursuant to N.C.G.S. 15A-1340.16A, it must allege the statutory factors supporting the enhancement in the indictment, which may be the same indictment that charges the underlying offense, and prove them beyond a reasonable doubt to a jury. The Court also held that, unless the statute describing the offense explicitly sets out a maximum sentence, the statutory maximum sentence for a criminal offense in North Carolina is determined by finding the highest possible minimum sentence in the aggravated range of Prior Record Level VI for the applicable offense class and then identifying the corresponding maximum sentence as set out in N.C.G.S. 15A-1340.17(e). Finally, the Court added that the intent of the General Assembly was for the trial court to add sixty months to the minimum sentence and then refer to the chart in N.C.G.S. 15A-1340.17(e) to determine the corresponding maximum 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 sixty months, and then determined the applicable maximum term of imprisonment according to the chart contained in N.C.G.S. 15A-1340.17(e).

**State v. Guice, 141 N.C. App. 177, 541 S.E.2d 474 (2000):** Defendant was convicted of assault by pointing a gun, communicating threats, assault on a female, possession of a firearm by a felon, and second-degree kidnapping. The trial court consolidated the offenses for sentencing under the second-degree kidnapping offense and enhanced the defendant's sentence pursuant to the firearm enhancement statute. Citing State v. Ruff, 349 N.C. 213, 505 S.E.2d 579 (1998), the Court of Appeals held that the use of a firearm was not an essential element of the crime of second-degree kidnapping and that the kidnapping offense was the underlying felony, not the firearm-related felonies, and so the trial court was not prohibited from using the firearm enhancement.

The Court of Appeals also found the firearm enhancement statute unconstitutional on its face. However, on remand from the Supreme Court, the Court of Appeals, citing State v. Lucas, 353 N.C. 568, 548 S.E.2d 712 (2001), withdrew that finding and found that the trial court erred in imposing the 60-month firearm enhancement penalty to defendant's sentence because the indictment failed to allege that defendant "used, displayed, or threatened to use or display a firearm at the time of the felony," and the factor was not submitted to the jury. The defendant’s

sentence was vacated and the case was remanded to the trial court for re-sentencing. *See State v. Guice*, 151 N.C. App. 293, 564 S.E.2d 925 (2002).

**State v. Ruff, 349 N.C. 213, 505 S.E.2d 579 (1998)**: The trial court enhanced defendant's sentence for second-degree kidnapping based on evidence that he used a gun during the commission of the offense. Defendant appealed, arguing that the use of the gun was an essential element in the contemporaneous conviction for first-degree rape. The Court of Appeals reversed. In reversing the Court of Appeals, the Supreme Court held that the underlying felony which was enhanced was the second-degree kidnapping offense and that because the use of a firearm is not an essential element of second-degree kidnapping, the trial court was not precluded from enhancing defendant's sentence pursuant to N.C.G.S. 15A-1340.16A. The Supreme Court found it was irrelevant that the first-degree rape required proof of use of a firearm because it was not the underlying felony which was enhanced.

**State v. Williams, 127 N.C. App. 464, 490 S.E.2d 583 (1997)**: The trial court applied the firearm enhancement to defendant's sentence pursuant to N.C.G.S. 15A-1340.16A even though 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 enhance a defendant's sentence by sixty months where the evidence at trial conclusively established that no gun was actually displayed, even where it appeared to the victim at the time of the offense that a gun was displayed.

**State v. Brice, 126 N.C. App. 788, 486 S.E.2d 719 (1997)**: The trial court enhanced defendant's second degree kidnapping sentence for use of a firearm where defendant was convicted of two counts of armed robbery and one count of second degree kidnapping. In finding that the trial court had erred, the Court of Appeals held that evidence of the use of a firearm which was relied upon to prove a necessary element of the kidnapping charge could not subsequently be used to enhance defendant's sentence.

**State v. Evans, 125 N.C. App. 301, 480 S.E.2d 435 (1997)**: The trial court sentenced defendant within the aggravated range for assault and armed robbery convictions and enhanced the sentence for defendant's kidnapping conviction by sixty months pursuant to N.C.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 conviction sentence for use of a firearm and by imposing a consecutive sentence for armed robbery because the evidence establishing use of a firearm for purposes of the enhancement was relied upon in establishing the armed robbery conviction. The Court of Appeals held that the firearm enhancement applies unless the underlying felony requires proof of use of a firearm and that the use of the firearm by defendant was not used to establish the first degree kidnapping conviction. The Court held that because kidnapping and armed robbery were two distinct criminal offenses requiring proof of different elements, punishment for these offenses by consecutive sentences did not violate the constitutional prohibition against double jeopardy.

**State v. Smith, 125 N.C. App. 562, 481 S.E.2d 425 (1997)**: The trial court enhanced defendant's

sentence for use of a firearm where evidence of the use of a firearm was necessary in proving the offense of voluntary manslaughter. The Court of Appeals held that if evidence of the use of a firearm is relied upon in proving an element of the offense, regardless of whether the use of a firearm is an actual element of the offense or not, then the firearm enhancement may not be applied.

#### **Step 5: Determine the Maximum Sentence.**

**State v. Parker, 143 N.C. App. 680, 550 S.E.2d 174 (2001)**: The trial court sentenced the 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. The 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 provides for judicial discretion in allowing the trial court to choose a minimum sentence within a specified range. **State v. Caldwell**, 125 N.C. App. 161, 479 S.E.2d 282 (1997). However, the language of the Act provides for no such discretion in regard to maximum sentences. The legislature did not provide a range of possible maximum sentences nor did it create a vehicle to alter the maximum sentences based on the circumstances of the case as with minimum sentences. See N.C.G.S. 1340.16. Rather, the Act dictates that once a minimum sentence is determined, the “corresponding” maximum sentence is “specified” in a table set forth in the statute. Thus, N.C.G.S. 15A- 1340.17 does not provide for judicial discretion in the determination of maximum sentences.

#### **Step 6: Determine the Sentence Disposition.**

##### ***A. Extraordinary mitigation***

**State v. Messer, 142 N.C. App. 515, 543 S.E.2d 195 (2001)**: The Court held that pursuant to N.C.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. The Court also held that extraordinary mitigation allows for a dispositional deviation from what is provided for by the grid (*i.e.*, imposition of an intermediate sentence where only an active sentence is authorized); not a deviation in sentence length.

**State v. Ray, 125 N.C. App. 721, 482 S.E.2d 755 (1997)**: The trial court did not find extraordinary mitigation pursuant to N.C.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.

##### ***B. Substantial assistance***

**State v. Saunders, 131 N.C. App. 551, 507 S.E.2d 911 (1998)**: The trial court limited itself to imposing a sentence from the felony punishment grid after it had found substantial assistance on

behalf of defendant. The Court of Appeals held that once the trial court has made a finding of substantial assistance, it is not limited to the authorized punishments under the grid, but may impose any sentence in its discretion.

### ***C. Consecutive sentences***

**State v. Parker, 137 N.C. App. 590, 530 S.E.2d 297 (2000)**: The trial court found the 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 argued her sentence was disproportionate to the crimes because her more culpable co-conspirators received lesser or equivalent sentences. The Court of Appeals upheld the decision of the trial court. Citing State v. Green, 348 N.C. 588, 502 S.E.2d 819 (1998), *cert. denied*, 525 U.S. 1111, 142 L. Ed. 2d 783 (1999) (citations omitted), the Court pointed out that the prohibition against cruel and unusual punishment does not require strict proportionality between the crime and the sentence, but that it forbids only extreme sentences that are 'grossly disproportionate' to the crime.

**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 ordered in the written judgment, without defendant being present, that the sentences were to run consecutively. The Court of Appeals vacated. While holding that the actual sentence is that which appears in the written judgment and not that which is spoken in open court, the Court ruled that because the trial judge failed to indicate in open court that the sentences would run consecutively, the presumption was that the sentences would run concurrently. The trial court erred in entering a written order different than that orally ordered in open court without providing the defendant with an opportunity to be heard.

**State v. Love, 131 N.C. App. 350, 507 S.E.2d 577 (1998)**: The trial court sentenced defendant to consecutive terms of imprisonment. Defendant argued that the imposition of consecutive sentences in this case was cruel and unusual punishment and that the lack of statutory guidance as to when concurrent and consecutive sentences are appropriate creates unguided judgments which lead to an abuse of discretion by the trial court. The Court of Appeals held that the trial court has the statutory authority to impose consecutive sentences and that the lack of guidelines as to the appropriateness of imposing consecutive sentences is a question for the legislature.

**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 trial court merge the sentences; the imposition of consecutive sentences does not violate the constitutional prohibition against double jeopardy.

#### ***D. Consolidated offenses***

**State v. Branch, 134 N.C. App. 637, 518 S.E.2d 213 (1999)**: Defendant was convicted of two separate counts of breaking and entering and of larceny with offense dates of September 19, 1994 and October 4, 1994. The offenses were consolidated and defendant was sentenced under Structured Sentencing to a minimum of twelve months and a maximum of fifteen months imprisonment. The Department of Correction sent the judgment back indicating that offenses that fall under the Fair Sentencing Act could not be combined for sentencing with offenses that fall under the Structured Sentencing Act. At resentencing, defendant received twelve to fifteen months for the offense on October 4, 1994 and ten years for the offense that occurred on September 19, 1994. On appeal, defendant argued that there was no prohibition in consolidating the offenses and that the new sentencing hearing was unlawful. The Court of Appeals upheld the trial court's action stating that the two offenses could not be consolidated because they were subject to different sentencing practices as a matter of law. The trial court had the authority to resentence pursuant to N.C.G.S. 15A-1415(b)(8) because the original sentence was unauthorized at the time it was imposed.

#### ***E. Intermediate punishments***

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

**State v. Payne, 156 N.C. App. 687, 577 S.E.2d 166 (2003)**: The trial court suspended defendant's active sentence and placed him on supervised probation for 36 months with a special condition that he serve 90 days in the county jail. The Court of Appeals found that a regular condition of any supervised probation—that during any active sentence time, the defendant had to obey the Department of Corrections rules applicable to inmates—applied to defendant even though he was being held at a local jail and not at a DOC facility. Thus, his violation of DOC rules during a 90 day period in a county jail justified revocation of his probation, where the trial judge was reasonably satisfied that a condition had been violated.

**State v. Hearst, 356 N.C. 132, 567 S.E.2d 124 (2002)**: Defendant participated in the IMPACT program for 81 days before he violated the conditions of his probation. The trial judge activated his sentence but denied him any credit for the time spent in IMPACT. The Supreme Court held that defendant should be given credit for his time at IMPACT because his 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). Defendant was given credit for time spent in custody awaiting trial, which included the time defendant spent on house arrest. The State filed a "Motion to Correct Judgement," arguing that defendant was not eligible for credit for time spent on house

arrest with electronic monitoring. The trial court corrected the clerical error and awarded credit only for the time 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 N.C.G.S. 15-196.1. The Court further held that the pretrial house arrest order was a proper regulatory restraint to ensure defendant's presence at the trial and to disable her from committing other offenses. It was not punishment and the defendant was not subject to double jeopardy.

#### ***F. Community punishments***

**State v. Smith, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (6 July 2004)**: On 6 December 2000, the District Court placed defendant on 12 months supervised probation for a misdemeanor conviction. The defendant appealed to Superior Court but later withdrew his appeal. The case was remanded to District Court for immediate execution. On 24 January 2002, the defendant's probation officer filed a probation violation report. The District Court dismissed the probation violation because the State failed to file the report before the expiration of the probation period. On appeal to Superior Court, the judge determined that when a defendant appeals his case from district court to superior court and later remands his case back to the district court, the date of remand starts the judgment. The Court of Appeals reversed the decision. It pointed out that under N.C.G.S. 15A-1431(f), an appeal stays the execution of portions of the judgment relating to fine and costs, but not probation. This is in contrast to an appeal under N.C.G.S. 15A-1451(a)(4) from superior court to the appellate courts where probation is expressly stayed.

**State v. Mucci, \_\_ N.C. App. \_\_, 594 S.E.2d 411 (2004)**: Defendant was sentenced to four consecutive counts of 6 to 8 months, suspended upon 36 months of probation conditioned upon weekly completion of 25 hours of community service and upon restitution in excess of \$26,000. The Court of Appeals held that, first of all, according to N.C.G.S. 15A-1343.2(d), defendants cannot be given more than 30 months of probation absent a specific finding that a longer term is necessary; here, the trial judge made no such finding. Secondly, looking at § 15A-1340.36, the Court held that in imposing both community service and restitution, the trial court should have taken into account such factors as the defendant's ability to be gainfully employed and earn enough money not only to pay restitution but also to support his family.

**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 resentencing, holding that restitution cannot include pain and suffering damages. The General Statutes, read in conjunction, clearly intend for restitution to cover tangible costs, income, and values. Pain and suffering, which normally must be determined by a jury, is neither tangible nor easily quantified.

**State v. Love, 156 N.C. App. 309, 576 S.E.2d 709 (2003)**: Defendant was convicted of a misdemeanor offense and the trial court imposed a 24-month period of probation. North Carolina General Statute 15A-1343.2(d) authorizes a probationary period of up to 18 months for a

misdemeanor sentenced to a community punishment unless the court makes specific findings that a longer period is necessary. The Court of Appeals found that the trial court committed error by extending the defendant's probationary period to 24 months without making the required specific finding of facts that a longer period of probation was necessary.

**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) 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 N.C.G.S. 15A-1346, any sentence of probation must run concurrently with any other probation sentences imposed.

**State v. Hicks, 148 N.C. App. 203, 557 S.E.2d 594 (2001)**: The trial court suspended defendant's term of imprisonment and placed defendant on supervised probation for a period of 18 months, which was scheduled to expire on August 18, 1999. Defendant's probation officer signed and dated a Violation Report on July 23, 1999. The Violation Report and Order for Arrest were filed on September 18, 2000. After defendant's probation violation hearing, defendant's probationary sentence was revoked and his sentence was activated. The Court of Appeals found that the trial court no longer had jurisdiction over the defendant. In order for a court to retain jurisdiction over a probationer after the period of probation has expired, N.C.G.S. 15A-1344 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. The judgment was arrested and defendant was discharged.

**State v. Lambert, 146 N.C. App. 360, 553 S.E.2d 71 (2001)**: Defendant was convicted of a misdemeanor offense and sentenced to an intermediate punishment including 36 months of supervised probation. Defendant appealed, arguing that the sentence imposed by the trial court, particularly the length of supervised probation for 36 months, was disproportionate to the crime for which defendant was convicted and violated the Eighth Amendment to the United States Constitution. The Court of Appeals held that the trial court erred by ordering a 36-month term of probation because it failed to make the required findings of fact that a longer term of probation was necessary.

**State v. Hughes, 136 N.C. App. 92, 524 S.E.2d 63 (1999)**: The Court of Appeals held that the trial court could not place defendant on probation for longer than the statutorily presumed period of probation without making findings that a longer period of probation was necessary.

**State v. Cardwell, 133 N.C. App. 496, 516 S.E.2d 388 (1999)**: On a reckless driving conviction, the trial judge sentenced defendant to twelve months of supervised and forty-eight months of unsupervised probation. N.C.G.S. 15A-1343.2(d) sets out by statute the presumed period of probation for defendants depending on whether they have committed a misdemeanor or felony and whether they are being sentenced to a community or intermediate punishment. The Court of Appeals held that the trial court erred by not making specific findings, as required by statute, that a longer than statutorily presumed period of probation was required before sentencing

defendant to five years of probation.

**State v. Hill, 132 N.C. App. 209, 510 S.E.2d 413 (1999)**: The trial court revoked defendant's probation for failure to complete his community service hours and failure to comply with the payment of restitution. Defendant argued that the trial court erred in not considering evidence of defendant's disability and his inability to do community service or make payments. The Court of Appeals reversed holding that the trial court must consider and evaluate evidence brought forth by a probationer that shows a lawful excuse for his violation and must make findings of fact which clearly indicate that this has been done.

## **SECTION II: ADDITIONAL SENTENCING PROVISIONS RELATING TO FELONIES**

### ***A. Violent Habitual Felon***

**State v. Wolfe, 157 N.C. App. 22, 577 S.E.2d 655(2003)**: Defendant was convicted of second degree murder and found to be a violent habitual felon. On appeal, the defendant argued among other things that the trial court erred by not instructing the jury that the State must prove defendant's identity with respect to the charge beyond a reasonable doubt and by failing to dismiss the violent habitual felon charge because the statute violates the *ex post facto* provisions of the state and federal constitutions. The Court of Appeals held that the trial court did not err in the defendant's violent habitual felon prosecution because the jury instruction included the defendant's name and could only be understood by the jury to refer to the defendant. Citing State v. Mason, 126 N.C. App. 318, 484 S.E.2d 818 (1997), *cert. denied*, 354 N.C. 72, 553 S.E.2d 208 (2001), the Court held that the statute did not violate the *ex post facto* clauses because it enhanced the punishment for the current offense and not the prior offense. Even though the violent habitual felon statute did not exist at the time of the prior offense, the defendant was on notice that certain convictions could enhance the punishment for future offenses because of the habitual felon statute.

**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 of being a violent habitual felon. Defendant appealed his conviction of being a violent habitual felon, arguing that since he has previously been found not guilty of violent habitual felon status as charged in an indictment alleging he committed the same two prior violent felonies upon which the State charged him as a violent habitual felon in the instant case, the State is precluded from trying defendant as a violent habitual felon on the indictment. The Court of Appeals held that, since the issue of whether the defendant was convicted of the two prior offenses was raised in the prior litigation, was material and relevant to the disposition of the prior action, and was necessary and essential to the jury's not guilty verdict in the prior action, the State was collaterally estopped from attempting to convict defendant of being a violent habitual felon based on the same two alleged prior violent felony convictions upon which a jury had previously found defendant not guilty of violent habitual felon status.

**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 contends that the violent habitual felon law is unconstitutional in that it denies a defendant due process and equal protection, denies freedom from *ex post facto* laws, denies freedom from cruel and unusual punishment, and denies a defendant freedom from double jeopardy. 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 the 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 violates his protection against *ex post facto* laws. The Court of Appeals held that with the enactment of Structured Sentencing the statutes covering the prior offenses were superceded and that because the status of violent habitual felon serves only to enhance defendant's punishment for the current predicate substantive felony, and not to increase the punishment of defendant for the prior felonies, there is no violation of defendant's rights against *ex post facto* laws.

### ***B. Habitual Felon***

**State v. Jones, 358 N.C. 473, 598 S.E.2d 125 (2004)**: Defendant plead guilty to being an habitual felon. One of the prior convictions supporting the habitual felon status was a conviction for possession of cocaine (N.C.G.S. 90-95(d)(2)). Defendant appealed to the Court of Appeals claiming the habitual felon indictment was insufficient because the offense of possession of cocaine is classified as a misdemeanor offense in the statute. The Court of Appeals agreed. The Supreme Court reversed the Court of Appeals. The Supreme Court held that, under N.C.G.S. 90-95(d)(2), the phrase "punishable as a Class I felony" does not simply denote a sentencing classification but dictates that a conviction for possession of cocaine is elevated to a felony classification for all purposes. The specific exceptions contained in section 90-95(d)(2) control over the general rule that possession of any Schedule II, III, or IV controlled substance is a misdemeanor. The conviction can serve as an underlying felony for an habitual felon indictment.

**State v. Hensley, 156 N.C. App. 634, 577 S.E.2d 417, *disc. rev. denied*, 357 N.C. 167, 581 S.E.2d 64 (2003)**: Defendant was found guilty of obtaining property by false pretenses and of being an habitual felon. On appeal, defendant argued that his conviction as an habitual felon was erroneous because: (1) a 1982 conviction should have been suppressed because he was not represented by counsel at the trial; (2) relying on a 19-year-old conviction was cruel and unusual punishment; and (3) his sentence was so disproportionate to the offense that it was cruel and unusual punishment. The Court of Appeals upheld the decision of the trial court, finding: (1) that claims of ineffective assistance of counsel do not amount to a failure to appoint counsel and cannot be used to collaterally attack a prior conviction; (2) there are no provisions under N.C.G.S. 14-7.4 prohibiting the use of past felonies due to any time limitation based on conviction date; and (3) the sentence imposed was not disproportionate because it was based on multiple offenses over a number of years and not just the current offense.

**State v. Fulp, 355 N.C. 171, 558 S.E.2d 156 (2002):** Defendant was indicted for felonious possession of stolen goods and for being an habitual felon. Defendant moved to suppress one of the three convictions used to support the habitual felon indictment, arguing that a 1993 conviction was obtained in violation of his right to counsel. The trial court denied the suppression motion on the grounds that defendant could not collaterally attack the prior conviction. On appeal, the Court of Appeals found that the trial court erred by not resolving the factual conflicts and ruling on the merits of defendant's motion to suppress. After a hearing on the motion, the trial court found that the defendant had waived his right to counsel for the 1993 conviction. The Court of Appeals then held that the trial court's conclusion was not adequately supported by its findings of fact. The Supreme Court held that the trial court correctly determined that defendant did not show by a preponderance of the evidence, as required by N.C.G.S. 15A-980(c), that he had not waived his right to counsel, and that the trial court's conclusion that defendant's waiver of counsel was made "knowingly, intelligently, and voluntarily" was adequately supported by its findings of fact, which was supported by the evidence. The decision of the Court of Appeals was reversed.

**State v. Carpenter, 155 N.C. App. 35, 573 S.E.2d 668 (2002):** A jury found defendant guilty of assault inflicting serious injury and assault on a female and found him to be an habitual felon. Defendant appealed, arguing that the trial court erred by denying defendant's motion to dismiss the habitual felon indictment based on incompetent prior convictions. The Court of Appeals found that the trial court erred by denying the motion to dismiss the habitual felon indictment because the State did not prove that the two prior convictions from New Jersey were felonies in New Jersey.

**State v. Cates, 154 N.C. App. 737, 573 S.E.2d 208 (2002), *disc. review denied*, 356 N.C. 682, 577 S.E.2d 897 (2003):** The trial court found defendant guilty of possession of heroin and of being an habitual felon. On appeal, defendant argued that his sentence violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the rule of lenity based on the prosecutor choosing prior offenses worth less prior record points for habitual felon status so that defendant's sentence was enhanced more than if the prosecutor had selected the higher point offenses. The defendant also argued that the trial court erred in denying his motion to dismiss the habitual felon charge because the prosecutor had a financial incentive to indict the defendant as an habitual felon. He bases his argument on the existence of a grant program for prosecution of habitual felon cases. The Court of Appeals found that the habitual felon statute was not ambiguous as to the use of prior convictions and, therefore, did not violate the rule of lenity or the Fourteenth Amendment. The Court also found that the prosecutor on the grant had no involvement in defendant's case, and there was no evidence of any relationship between the number of prosecutions and the continuation of the grant. The record did not show a financial incentive for that prosecutor to have indicted that defendant as an habitual felon.

**State v. Murray, 154 N.C. App. 631, 572 S.E.2d 845 (2002):** Defendant was originally indicted for felonious larceny of a motor vehicle and as an habitual felon. Defendant was later indicted for possessing the stolen vehicle. Defendant was convicted of possessing a stolen vehicle and

found to be an habitual felon. On appeal, defendant 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 underlying felony for which defendant was convicted. The Court of Appeals held that the habitual felon indictment complied with the Habitual Felon Act because there was a pending prosecution to which the habitual felon proceeding was ancillary. Defendant was tried for felonious possession and for being an habitual felon at the same session of criminal court by the same jury.

**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. The habitual felon indictment listed five prior convictions and the trial court used one of those prior convictions in calculating the defendant's prior record score. The Court of Appeals reversed finding that the trial court erred by counting a prior conviction in the defendant's prior record score which was used to establish defendant's habitual felon status. Even though only three felony convictions are necessary to support habitual felon status, N.C.G.S. 14-7.6 specifically provides that convictions used to establish a person's status as an habitual felon shall not be used in determining a defendant's prior record level.

**State v. Brown, 146 N.C. App. 590, 553 S.E.2d 428 (2001):** Defendant was convicted of two counts of possession with intent to sell or deliver marijuana, two counts of sale of marijuana, and of being an habitual felon. The trial court arrested judgment on the possession convictions, consolidated the remaining convictions, and sentenced defendant as an habitual felon. Defendant argued on appeal that the Habitual Felons Act was ambiguous with regard to when a person becomes an habitual felon, and consequently, the rule of lenity requires that his indictment as an habitual felon be dismissed. The Court of Appeals upheld the trial court in finding that the statute is clear and, therefore, the rule of lenity does not apply. The Court found that 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 the defendant's rights in that the State must prove to the satisfaction of a jury that the defendant has in fact been convicted of three qualifying felonies.

**State v. Parks, 146 N.C. App. 568, 553 S.E.2d 695 (2001):** Defendant was found guilty of felonious larceny and felonious possession of stolen goods. Defendant pled guilty to the habitual felon status. Defendant argued on appeal that the indictment violated the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution because the District Attorney had a policy of prosecuting all persons potentially eligible for habitual felon status while other districts may not have that policy. Defendant also argued that the Habitual Felon Act was impliedly repealed by the Structured Sentencing Act because of an "irreconcilable conflict" between the two Acts. The Court held that there was no violation of the Equal Protection Clause when one District Attorney prosecutes every eligible defendant for habitual felon while other District Attorneys selectively prosecute some eligible defendants. Selective prosecution violates the Constitution when the selection is deliberately based upon unjustifiable standards such as race, religion or other arbitrary classifications. The Court also held that the Structured Sentencing Act was

different from the Habitual Felon Act but not in conflict. The Structured Sentencing Act applied to all people committing misdemeanors or felonies and enhances their sentence based on their prior record. The Habitual Felon Act only applied to a defendant who had committed three prior non-overlapping felonies and elevated that person's status within structured sentencing. Moreover, the Court pointed out that the Habitual Felon Act had been amended since structured sentencing was enacted and it is presumed that the General Assembly would not have amended a statute it had repealed in a more recent statute.

**State v. Brown, 146 N.C. App. 299, 552 S.E.2d 234 (2001):** defendant pleaded guilty to possession with intent to sell and deliver marijuana and to being an habitual felon. Defendant argued on appeal that the Habitual Felon Act, used in conjunction with the Structured Sentencing Act, violated the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 19, of the North Carolina Constitution by subjecting him to double jeopardy. The Court held that the use of habitual felon law in conjunction with Structured Sentencing does not violate protections against double jeopardy because statutorily the same prior conviction cannot be used to both calculate a defendant's prior record and to support his habitual felon status. The Court also noted that neither structured sentencing nor the Habitual Felon Act was used to punish the defendant for his prior convictions. Both laws were used to enhance the defendant's punishment for his current offense.

**State v. Gilmore, 142 N.C. App. 465, 542 S.E.2d 694 (2001):** Defendant stipulated to the three prior felony convictions and to being an habitual felon. The Court of Appeals reversed the habitual felon conviction and remanded for resentencing. Citing State v. Williams, 133 N.C. App. 326, 515 S.E.2d 80 (1999), the habitual felon charge must be submitted to the jury or the defendant must plead guilty to it. The charge was not submitted to the jury in this case and the trial court did not ask the necessary questions to establish a record of a guilty plea.

**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. Defendant argued on appeal that N.C.G.S. 14-7.4 requires a certified copy of court records and that the trial court committed reversible error in admitting into evidence a facsimile of a certified copy of court records as proof of his prior felony larceny conviction for the purpose of establishing his status as an habitual felon. The Court of Appeals upheld the trial court's decision, finding that N.C.G.S. 14-7.4 does not limit proof of prior convictions to certified copies and that, based on the trial court's examination of the facsimile, it complied with the statute.

**State v. Wilson, 139 N.C. App. 544, 533 S.E.2d 865 (2000), *appeal dismissed and disc. review denied*, 353 N.C. 279, 546 S.E.2d 394 (2000):** Defendant was convicted of two felony offenses and of being an habitual felon. He was sentenced for the habitual felon status and on the principal felonies. Defendant appealed, arguing that the habitual felon provision violates Article I, Section 6, of the North Carolina Constitution (separation of powers) by authorizing the District

Attorney to decide whether to enhance the legislatively prescribed punishment and that his habitual felon sentence should be imposed on the principal felonies, not in addition to them. The Court of Appeals held that the habitual felon statute only violated the Constitution if the defendant showed that the prosecutorial system was based on a discriminatory motive and had a discriminatory effect. No such showing was made. The Court also held that being an habitual felon is a status and not a crime. Upon conviction as an habitual felon, the court must sentence defendant for the underlying felony but as a Class C felon.

**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 being an habitual felon. On appeal, defendant argued that the trial court erred by sentencing him as an habitual felon because the habitual misdemeanor assault statute did not constitute a substantive offense but merely confers a status onto defendant. Based on the language of the statute, the Court of Appeals found that the Legislature intended that habitual misdemeanor assault be a substantive offense rather than a status. Therefore, habitual misdemeanor assault could be used as one of the three felonies required to support an habitual felon conviction.

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

**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 another prior conviction which was used to establish defendant's habitual felon status. The Court of Appeals upheld the trial court stating that where prior offenses have been consolidated for judgment, each prior conviction still stands; one can be used to establish habitual felon status while the other can be used in the calculation of defendant's prior record level.

**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. These prior convictions were also used to support the current conviction of habitual drunk driving. The Court of Appeals found that N.C.G.S. 14-7.6 speaks specifically to prohibiting the use of a prior conviction for both establishing habitual felon status and for enhancing a defendant's prior record level. The Court held that nothing in N.C.G.S. 14-7.6 prohibits using the same offense to establish defendant as both an habitual drunk driver and an habitual felon.

**State v. Truesdale, 123 N.C. App. 639, 473 S.E.2d 670 (1996):** In determining defendant's prior record level, the trial court counted convictions that were from the same session of court and were consolidated with prior convictions used to establish defendant's habitual felon status. The Court of Appeals held that even though N.C.G.S. 14-7.6 prohibits using the same conviction to establish both habitual felon status and prior record level and N.C.G.S. 15A-1340.14(d) prohibits the use of more than one conviction obtained in a single calendar week to increase the defendant's prior record level, nothing in the statutes prohibits the trial court from using one conviction obtained in a single calendar week of court to establish habitual felon status and using another separate conviction obtained during that same week to determine the prior record level.

**State v. Bethea, 122 N.C. App. 623, 471 S.E.2d 430 (1996):** In determining the prior record level, the trial court assigned defendant two additional points. One point was added because all the elements of the present offense were included in a prior conviction. A second point was assessed based on defendant's current probation status. Each of these underlying prior offenses was also used to establish defendant's habitual felon status. The Court of Appeals affirmed the trial court. Relying on N.C.G.S. 15A-1340.14(b)(6) and (b)(7), the Court held that the assigning of additional points addresses the timing and nature of the offense for which the defendant is now being sentenced, rather than the mere existence of a prior offense. Therefore, the prohibition against double counting a prior conviction to determine habitual felon status and prior record level has not been violated.

**State v. Cheek, 339 N.C. 725, 453 S.E.2d 862 (1995):** Defendant's habitual felon indictment did not refer to the specific predicate felony. The Supreme Court held that N.C.G.S. 14-7.3 does not require that the indictment refer to the specific predicate felony. It only needs to give notice to the defendant of the prior felonies which the State is relying upon to support an habitual felon charge.

### ***C. Life without Parole***

**State v. Allen, 346 N.C. 731, 488 S.E.2d 188 (1997):** The trial court sentenced defendant to life imprisonment without parole on a conviction for murder. Defendant argued that the sentence of life without parole is unconstitutional in that it violates the state constitution's Separation of Powers Clause, is not recognized by the state constitution, violates due process and the law of the land clause and violates the state constitution's provision against cruel and unusual punishment. In determining that life imprisonment without parole does not violate the Separation of Powers clause, the Supreme Court held that the Governor constitutionally does not have the power to parole and that the Governor's constitutional power to grant clemency remains unencumbered. In holding that life imprisonment without parole is provided for within the constitution's language, the Court stated that only the General Assembly has the power to prescribe the maximum and minimum punishments which can be imposed and pointed out that

imprisonment is a legitimate form of punishment under Article XI, sec 1 (amended 1996) of the state constitution.

***D. Other provisions***

**State v. Coble, 351 N.C. 448, 527 S.E.2d 45 (2000):** Defendant was indicted for one count of attempted murder. At trial, over defendant's objection, the trial court instructed the jury on two degrees of attempted murder - "attempted first-degree murder" and "attempted second-degree murder." The jury found defendant guilty of attempted second degree murder. On appeal, the Court of Appeals found no error. The Supreme Court reversed stating that the crime of attempt requires the specific intent to commit the underlying offense and that the specific intent to kill is not an element of second-degree murder; therefore, the crime of attempted second-degree murder does not exist under North Carolina law.

**State v. Roberts, 351 N.C. 325, 523 S.E.2d 417 (2000):** Defendant was sentenced to a minimum of eight months' and a maximum of ten months' imprisonment for a class E, level II felony. The Clerk of Superior Court for that county was notified by the Department of Correction that the sentence imposed did not fall within the sentencing range for a Class E offense under structured sentencing. The judge entered an amended judgment outside the presence of defendant and his attorney, sentencing defendant to a minimum of 29 months and a maximum of 44 months of imprisonment, which fell within the correct sentencing range for a Class E, level II felony. Defendant filed a motion for appropriate relief claiming that when the term of imprisonment was changed, he was not given notice or an opportunity to be heard. A hearing on defendant's motion was held with both defendant and his attorney present. The judge ruled that the amended judgment had not been properly entered because neither defendant nor his attorney had been present and set aside the amended judgment. Defendant was re-sentenced to a minimum of 29 months and a maximum of 44 months imprisonment, which was within the correct sentencing range. The Court of Appeals allowed the defendant's petition for writ of certiorari for the limited purpose of vacating the judgment and commitment entered by the second judge and reinstating the judgment and commitment entered by the first judge. The Supreme Court reversed the Court of Appeals. It found that trial courts are required to enter criminal judgments consistent with the provisions of the Structured Sentencing Act and that the General Statutes clearly provide that a sentence of unauthorized duration can be modified. *See* N.C.G.S. 15A-1445(a)(3)(c) (1999) Moreover, pursuant to N.C.G.S. 15A-1417(a)(4), when a court grants a motion for appropriate relief, the court can grant "[a]ny other appropriate relief" in addition to the relief specifically enumerated in the statute. N.C.G.S. 15A- 1417(a)(4) (1999). The original sentence violated the Structured Sentencing Act; therefore, the resentencing was proper in the instant case. The Supreme Court remanded the case to the Court of Appeals for further remand to the Superior Court for reinstatement of the sentence imposed upon defendant by the second judge.

**State v. Hilbert, 145 N.C. App. 440, 549 S.E.2d 882 (2001):** The Court upheld the trial court's

order that if defendant violated his probationary sentence by failing a drug test that he was to be immediately arrested and placed under a \$100,000 cash bond. But the Court stated that the preferred practice was for a trial court to make a recommendation as to a bond when a defendant is to be arrested for an allegation of a violation of probation, not for the trial court to mandate an amount.

**State v. Linemann, 135 N.C. App. 734, 522 S.E.2d 781 (1999)**: Pursuant to a motion for appropriate relief brought by the defendant, the District Court judge corrected several clerical errors which appeared in the judgment and denied all other portions of defendant's motion. In answering the question of whether defendant could appeal to Superior Court for a trial de novo from the date the judgment was corrected in District Court, the Court of Appeals held that the correction of a clerical error in a judgment and commitment form does not constitute a new conviction or judgment, that more than the ten days allotted for the filing of an appeal had elapsed since the original entry of the judgment and, therefore, defendant could not appeal for a trial de novo.

**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. By a concurring opinion, the Court of Appeals held that because the prosecution chose to charge with one offense, instead of separate offenses for each transaction, and the indictment alleged that the offense was not concluded until after October 1, 1994 (when structured sentencing became effective) defendant must be sentenced under the Structured Sentencing Act.