

1. THE SENTENCING COMMISSION

Q. What year was the commission established? Has the commission essentially retained its original form or has it changed substantially or been abolished?

The North Carolina General Assembly established the North Carolina Sentencing and Policy Advisory Commission on July 28, 1990. The Commission remains in existence to the present.¹

Q. Membership: who appoints them, for what terms, with what required qualifications?

The Commission currently consists of 28 members:

- (1) A sitting or former Justice or judge of the General Court of Justice appointed by the Chief Justice of the North Carolina Supreme Court who will serve as the commission chair;
- (2) The Chief Judge of the North Carolina Court of Appeals, or designee;
- (3) The Secretary of Public Safety or designee;
- (4) The Chairman of the Parole Commission or designee;
- (5) The President of the Conference of Superior Court Judges or designee;
- (6) The President of the District Court Judges Association or designee;
- (7) The President of the North Carolina Sheriff's Association or designee;
- (8) The President of the North Carolina Association of Chiefs of Police or designee;
- (9) One member of the public at large, who is not currently licensed to practice law in North Carolina, to be appointed by the Governor;
- (10) One member to be appointed by the Lieutenant Governor;
- (11) Three members of the House of Representatives, to be appointed by the Speaker of the House;
- (12) Three members of the Senate, to be appointed by the President Pro Tempore of the Senate;
- (13) A representative of the North Carolina Community Sentencing Association as recommended by the President of that organization, to be appointed by the President Pro Tempore of the Senate;
- (14) A member of the business community as recommended by the President of the North Carolina Retail Merchants Association, to be appointed by the Speaker of the House of Representatives;
- (15) A criminal defense attorney as recommended by the President of the North Carolina Academy of Trial Lawyers, to be appointed by the Chief Justice of the North Carolina Supreme Court;
- (16) The President of the Conference of District Attorneys or designee;
- (17) A member of the North Carolina Victim Assistance Network as recommended by the President of that organization, to be appointed by the Lieutenant Governor;
- (18) A rehabilitated former prison inmate, to be appointed by the Chairman of the Commission;
- (19) The President of the North Carolina Association of County Commissioners or designee;
- (20) A member of the academic community, with a background in criminal justice or corrections policy, as recommended by the President of The University of North Carolina, to be appointed by the Governor;
- (21) The Attorney General, or designee;
- (22) A member of the North Carolina Bar Association as recommended by the President of that organization, to be appointed by the Governor.
- (23) A member of the Justice Fellowship Task Force, who is a resident of North Carolina, to be appointed by the Chairman of the Commission.

¹ 1990 N.C. Laws ch. 1076, §1; N.C. Gen. Stat. §164-35 (2018). For a thorough assessment of sentencing reform in North Carolina see Ronald F. Wright, *Counting the Cost of Sentencing in North Carolina, 1980-2000*, 29 Crime & Just. 39 (2002).

(24) The President of the Association of Clerks of Superior Court of North Carolina or designee.²

Q. Is the commission an independent agency, or is it located in or hosted by some other state agency?

The North Carolina Sentencing and Policy Advisory Commission is an independent, advisory commission, operating within the North Carolina Judicial Branch.³

Q. How many staff does the commission have? Are they dedicated to the commission, or shared with another agency?

The Commission is required to employ an Executive Director, selected from candidates presented by the Chairman and the Director of the Administrative Office of the Courts.⁴ In addition to the Executive Director, the Commission presently employs nine employees, consisting of one Associate Director for Policy/Staff Attorney, one Associate Director for Research, one Administrative Secretary, one Senior Research and Policy Associate, and five Research and Policy Associates.⁵ The staff is dedicated to the Commission and is not shared with another agency or branch of the North Carolina government.⁶

Q. What is the commission's current statutory mandate?

The Commission's initial mandate was to develop and recommend to the legislature a structured sentencing system taking into account parameters set in statute.⁷ With that accomplished, the Commission's current mandate includes reviewing proposed legislation to ensure consistency with Structured Sentencing,⁸ conducting studies and producing regular reports on adult and juvenile recidivism, the effectiveness of Juvenile Crime Prevention Council grants and the Justice Reinvestment Initiative,⁹ and producing projections of and reporting on available beds in the Statewide Misdemeanant Confinement Program.¹⁰

Q. Do statutes and/or guidelines identify management of prison and jail resources as a goal?

Yes. The General Assembly's creation of the North Carolina Sentencing and Advisory Policy Commission was particularly motivated by prison overcrowding during the 1980s. In early 1988, after a costly surge of prison construction and renovation failed to solve the problem of prison overcrowding, a Special Committee on Prisons proposed creating a sentencing commission to prioritize resources and adjust levels of punishment to ensure appropriate use of state revenues.¹¹ In 1990, the newly created Sentencing and Policy Advisory Commission developed a set of five principles to guide its reforms. The following two principles identified resource management as a goal.

² N.C. Gen. Stat. § 164-37 (2018).

³ *About Councils and Commissions*, The North Carolina Court System, <http://www.nccourts.org/Courts/CRS/Councils/Default.asp> (last visited July 30, 2019); see also Lorrin Freeman, N.C. Sentencing & Pol. Advisory Comm'n, *The North Carolina Sentencing and Policy Advisory Commission: A History of its Creation and its Development of Structured Sentencing 8* (Aug. 2009 ed.), https://www.nccourts.gov/assets/documents/publications/commission_history_aug2009.pdf?O7ZRQnnfMS8XX67WIOodhh7g8.UPWR3

⁴ N.C. Gen. Stat. § 164-39 (2018).

⁵ *Commission Staff*, The North Carolina Court System, <http://www.nccourts.org/Courts/CRS/Councils/spac/Staff.asp> (last visited Jan. 18, 2018).

⁶ N.C. Gen. Stat. § 164-39 (2018)

⁷ See N.C. Gen. Stat. §§ 164-40, 43 (2018).

⁸ N.C. Gen. Stat. § 164-43(e) – (h) (2018).

⁹ N.C. Gen. Stat. § 164-47 – 50 (2018).

¹⁰ N.C. Gen. Stat. § 164-51 (2018).

¹¹ Freeman, *supra* note 3, at 7-8.

- **Sentencing policies should set resource priorities:** The use of prisons and jails should be prioritized first for violent and repeat offenders and community-based programs should be first utilized for nonviolent offenders with little or no prior record.
- **Sentencing policies should be balanced with correctional resources:** Sentencing policies should be supported by adequate prison, jail, and community-based resources.¹²

Under a statute passed in 1993 with the Structured Sentencing Act, legislators were required to consider future fiscal assessments based on impact projections generated by the Commission's computer simulation model.¹³

Q. Are sentencing practices studied by means of annual or other regular data sets? If so, are those data sets made available to outside researchers?

Yes. The North Carolina Sentencing and Policy Advisory Commission produces periodic Correctional Population Projections, Statistical Reports, biennial Recidivism Reports and Progress Reports on the effectiveness of JCPC (Juvenile Crime Prevention Council) Grant Recipients, and annual Justice Reinvestment Implementation Reports. These reports, and other supplementary reports, are published on the Commission's website.¹⁴ The Commission's annual sentencing data may be requested by outside researchers.

2. THE GUIDELINES

Q. When were the guidelines first implemented?

North Carolina's system of Structured Sentencing went into effect on October 1, 1994, and applies to all felonies and most misdemeanor offenses committed on or after that date.¹⁵

Q. In recent years, have they been modified at least once a year?

The Commission is authorized to make an annual report of recommendations for sentencing changes, including potential legislation, to the General Assembly. The General Assembly has adopted changes to sentencing laws periodically since 1994, though not on an annual basis.¹⁶

Q. Do the commission's recommended initial or modified guidelines require affirmative legislative approval, or do they take effect subject to legislative override?

Because North Carolina's sentencing structure is codified in state law, the Commission's recommendations require legislative approval.¹⁷

¹² N.C. Structured Sentencing Training & Reference Manual 1 (Dec. 1, 2014).

¹³ Freeman, *supra* note 3, at 23-24.

¹⁴ See *Publications*, Sentencing and Policy Advisory Commission, The N.C. Court System, <http://www.nccourts.org/Courts/CRS/Councils/spac/Publication/Default.asp> (last visited July 30, 2019). The Commission is specifically tasked to produce many of these reports. N.C. Gen. Stat. §§ 164-43 – 164-50 (2018).

¹⁵ N.C. Gen. Stat. § 15A-1340.10 (2018). See also N.C. Structured Sentencing Training & Reference Manual 3 (Dec. 1, 2014).

¹⁶ See N.C. Gen. Stat. § 164-36 (2018); N.C. Structured Sentencing Training & Reference Manual 1–2 (Dec. 1, 2014) (providing a chronology of changes to sentencing laws adopted by the General Assembly).

¹⁷ See N.C. Gen. Stat. § 164-36 (2018) (requiring the Sentencing Commission to provide recommendations to the General Assembly).

Q. Do the sentencing guidelines only apply to felonies, or are some misdemeanors and other lesser offenses also covered? Are some felonies excluded (e.g., those subject to life and/or death penalty)?

The Structured Sentencing system applies to both felony and misdemeanor offenses, with the exceptions of driving while impaired, driving while impaired in a commercial vehicle, failure to comply with control measures imposed on persons with communicable diseases, and violent habitual offenders.¹⁸

Q. Is a grid used? Are there multiple grids? How many severity levels does the grid contain?

North Carolina Structured Sentencing is represented in a grid format with separate grids for felonies and misdemeanors.¹⁹ Severity levels are referred to as offense classes.

The present felony grid, outlining punishment for offenses committed on or after October 1, 2013, contains ten offense classes organized as A, B1, B2, C, D, E, F, G, H, and I. Class A represents the most serious offenses, and Class I representing the least serious offenses.²⁰

The present misdemeanor grid, outlining punishment for offenses committed on or after December 1, 2013, contains four offense classes, organized as A1, 1, 2, 3. Classes 1 through 3 are based on the maximum punishments prescribed under the law prior to structured sentencing, with class 1 representing more serious offenses and class 3 representing less serious offenses. Class A1 is a separate class that was created for certain assaultive offenses.²¹

Q. How is the presumptive sentence determined?

Felony Offenses:

For felony offenses, the presumptive sentence is determined by applying six steps: 1) determine the offense class for each conviction; 2) determine the offender's prior record level; 3) consider aggravating or mitigating factors; 4) select a minimum sentence from the appropriate sentence range; 5) determine the maximum sentence; 6) select the sentence disposition.²²

The felony grid is used to determine the minimum sentence. The possible minimum sentencing ranges can be located on the grid in the cell at the intersection of the offense class (determined in Step 1) and the prior record level (determined in Step 2). Before selecting a minimum sentence, the court must consider evidence of aggravating or mitigating factors (Step 3).²³ Each cell is divided into three ranges of minimum sentences: aggravated, presumptive, and mitigated. The court must select a minimum sentence from within the presumptive minimum sentence range, unless the court finds that an aggravated or mitigated sentence is appropriate (Step 4).²⁴

The court must then impose a maximum term of imprisonment which is set by statute based on the minimum term imposed (Step 5). For Classes F through I, the maximum sentence is 120% of the minimum sentence

¹⁸ N.C. Gen. Stat. § 15A-1340.10 (2018); N.C. Structured Sentencing Training & Reference Manual 3, 50 (Dec. 1, 2014). Driving while impaired, while a misdemeanor, is codified under North Carolina's motor vehicle statutes, not its criminal law statutes. N.C. Gen. Stat. § 20-138.1 (2018).

¹⁹ N.C. Gen. Stat. § 15A-1340.17(c) (2018) (felony sentencing chart); N.C. Gen. Stat. § 15A-1340.23(c) (2017) (misdemeanor sentencing chart). See also N.C. Structured Sentencing Training & Reference Manual 4, 51 (Dec. 1, 2014).

²⁰ N.C. Gen. Stat. § 15A-1340.17(c) (2018); N.C. Structured Sentencing Training & Reference Manual 4 (Dec. 1, 2014).

²¹ N.C. Gen. Stat. § 15A-1340.23(c) (2018); N.C. Structured Sentencing Training & Reference Manual 51, 53 (Dec. 1, 2014).

²² N.C. Structured Sentencing Training & Reference Manual 6 (Dec. 1, 2014).

²³ See N.C. Gen. Stat. § 15A-1340.16 (2018); N.C. Structured Sentencing & Training Reference Manual 19-24 (Dec. 1, 2014).

²⁴ See N.C. Gen. Stat. § 15A-1340.17(c) (2018); N.C. Structured Sentencing & Training Reference Manual 25-27 (Dec. 1, 2014).

rounded to the next highest month plus an additional nine months for post-release supervision. For Classes B1 through E, the maximum sentence is 120% of the minimum sentence rounded to the next highest month plus an additional 12 months for post-release supervision.²⁵

Finally, the court must impose a disposition as indicated in the appropriate cell (Step 6). The North Carolina Structured Sentencing system authorizes three types of disposition: Active, Intermediate, or Community punishment. An Active punishment requires that the offender serve the sentence of imprisonment. Intermediate punishment requires a period of supervised probation. And Community punishment may consist of a fine only or a term of supervised or unsupervised probation. If the disposition in the applicable cell is “A,” the sentence must be activated. If the disposition in the applicable cell is “C” or “I,” the sentence must be suspended.²⁶

Misdemeanor Offenses:

For misdemeanor offenses, the presumptive sentence is determined by applying four steps: 1) determine the offense class for each misdemeanor conviction; 2) determine the prior record level for the offender; 3) select the sentence length from the appropriate range; and 4) select a sentence disposition.

The overall process is similar to that for determining the presumptive sentence for felony offenses with a few key differences. First, misdemeanors are divided into four offense classes. Second, fewer factors are considered when determining the offender’s prior record level. Third, once the appropriate cell on the misdemeanor grid is located, it will contain only one range (unlike the three ranges included on the felony grid), and the court will impose a single sentence length from within that range (there is no requirement to impose a minimum and maximum as for felonies). Additionally, because there is only one range, there is no step to consider mitigating or aggravating factors. Fourth, when pronouncing a disposition, if the court imposes active punishment, the offender will serve that time in a local confinement facility rather than in prison.²⁷

Q. Is the choice among types of sentences regulated by a “disposition” or other prison in/out line? Are “out” sentences accompanied by suspended execution of prison or suspended imposition of sentence? By definitive preclusion or prison for those cases?

There is no formal disposition line on either the felony or misdemeanor grid (though one could be drawn informally based on the permissible dispositions). Decisions as to type of sentence are regulated by the provisions in each cell of the grid. Some grid cells permit a choice of two or even three dispositions, while other cells only permit a single disposition.²⁸ There are three sentence types: Active, Intermediate, and Community punishments (designated by “A” for Active, “I” for Intermediate, and “C” for Community).²⁹ In each case the judge must decide the duration of jail or prison confinement before deciding whether to suspend that term and impose an Intermediate or Community punishment. Intermediate and Community punishments (“out” sentences) are typically accompanied by a suspended execution of custody. However, some forms of Community punishment may consist of a fine only, in which case, there would be no suspended sentence.³⁰

²⁵ N.C. Gen. Stat. § 15A-1340.17(d) – (f) (2018); N.C. Structured Sentencing & Training Reference Manual 28-29 (Dec. 1, 2014).

²⁶ N.C. Gen. Stat. § 15A-1340.17(c) (2018); N.C. Structured Sentencing & Training Reference Manual 30-41 (Dec. 1, 2014).

²⁷ See N.C. Structured Sentencing & Training Reference Manual 52-69 (Dec. 1, 2014).

²⁸ See N.C. Structured Sentencing & Training Reference Manual 4, 51 (Dec. 1, 2014).

²⁹ N.C. Gen. Stat. § 15A-1340.17 (2018); N.C. Structured Sentencing Training & Reference Manual 30 (Dec. 1, 2014).

³⁰ *Id.*

Active punishment requires the offender to serve the imposed jail sentence (for misdemeanors) or prison sentence within the minimum and maximum sentence imposed by the court (for felonies). An Intermediate punishment requires a sentence of supervised probation and may also include one or more of the following:

- (1) a split sentence of confinement followed by probation;
- (2) a drug treatment court program;
- (3) house arrest with electronic monitoring;
- (4) community service;
- (5) a period or periods of confinement in a local confinement facility;
- (6) substance abuse assessment, monitoring, and treatment;
- (7) continuous alcohol monitoring;
- (8) educational or vocational skills development program; and
- (9) satellite-based monitoring.³¹

A Community punishment is any authorized sentence that does not include an active punishment, assignment to a drug treatment court, or special probation. A Community punishment may consist of a fine only or a term of supervised or unsupervised probation.³²

Q. Are there border boxes or other categories permitting multiple sentence types?

Yes, 18 of the 54 cells on the felony grid are border boxes permitting a choice between two or three sentence types (16 cells are designated I/A, one is C/I, and one is C/I/A); 34 cells permit only Active punishment, one cell permits only Intermediate punishment, and one cell permits only Community Punishment.³³ On the misdemeanor grid, nine of the 13 cells are border boxes (seven are C/I/A, while two are C/I); the other four cells permit only Community punishment.³⁴ For both the felony and misdemeanor grids, when multiple dispositions are prescribed, the court has discretion to impose any of the dispositions authorized.³⁵

Q. Are the guidelines purely advisory, or are they legally binding?

The North Carolina Structured Sentencing system is written into the statutes, and is thus legally binding. Judges have discretion to impose a sentence duration from the aggravated or mitigated range provided that reasons for this choice are stated on the record,³⁶ but dispositional departures are significantly restricted. (Notably, however, in practice, most offenders are sentenced under one of the “border box” cells that provide the judge with the discretion to choose an active prison sentence or an intermediate non-prison sanction.³⁷)

³¹ N.C. Gen. Stat. § 15A-1340.11(6) (2018); N.C. Structured Sentencing Training & Reference Manual 30-31 (Dec. 1, 2014).

³² See N.C. Gen. Stat. § 15A-1340.11(2) (2018); N.C. Structured Sentencing Training & Reference Manual 31–32 (Dec. 1, 2014).

³³ See N.C. Gen. Stat. § 15A-1340.17(c) (2018); N.C. Structured Sentencing Training & Reference Manual 4 (Dec. 1, 2014).

³⁴ See N.C. Gen. Stat. § 15A-1340.23(c) (2018); N.C. Structured Sentencing Training & Reference Manual 51 (Dec. 1, 2014).

³⁵ N.C. Structured Sentencing Training & Reference Manual 30, 60 (Dec. 1, 2014).

³⁶ See N.C. Gen. Stat. § 15A-1340.16(c) (2018); N.C. Structured Sentencing Training & Reference Manual 1 (Dec. 1, 2014). See also North Carolina Sentencing Case Law, in this Resource Center.

³⁷ See, e.g., North Carolina Sentencing and Policy Advisory Commission, *Structured Sentencing Statistical Report for Felonies and Misdemeanors FY 2018* 3 tbl.1 (Jan. 2019).

3. DEPARTURES AND SIMILAR ADJUSTMENTS TO GENERALLY-RECOMMENDED SENTENCES

Q. What is the overall/general standard for departure?

Judges must sentence in the presumptive range unless they make findings to support a sentence in an aggravated or mitigated range. “If aggravating factors are present and the court determines they are sufficient to outweigh any mitigating factors that are present, it may impose a sentence from the aggravated range. If the court finds that mitigating factors are present and are sufficient to outweigh any aggravating factors that are present, it may impose a sentence from the mitigated range.” The decision to depart from the presumptive range and sentence in an aggravated or mitigated range is at the judge’s discretion.³⁸

Downward dispositional departures from an active prison cell (that is, imposing an intermediate or community sentence rather than an active prison sentence) are only allowed upon a finding of “extraordinary mitigation,” which requires that: (1) extraordinary mitigating factors of a kind significantly greater than the normal case are present; (2) such factors substantially outweigh any aggravating factors; and (3) the imposition of an active sentence would be a “manifest injustice.” Extraordinary mitigation is not available for all offenses.³⁹

Q. Are there lists of aggravating and mitigating circumstances permitting departure? If so, are such lists non-exclusive? Is there a list of prohibited factors?

The North Carolina Structured Sentencing system contain lists of aggravating and mitigating factors which courts must consider; there are 29 specified aggravating factors and 20 mitigating factors.⁴⁰ Each list of factors also contains a general “catch all” provision permitting courts to consider any other aggravating or mitigating factor “reasonably related to the purposes of sentencing.”⁴¹

Q. Do the guidelines expressly address mitigations based on a guilty plea, acceptance of responsibility, and/or providing assistance to law enforcement?

Yes, the North Carolina Structured Sentencing system provides for mitigation in cases in which the defendant aided in the apprehension of another felon, testified truthfully on behalf of the prosecution in another prosecution of a felony, or accepted responsibility for the defendant’s criminal conduct.⁴²

³⁸ N.C. Gen. Stat. § 15A-1340.16(b) (2018); N.C. Structured Sentencing Training & Reference Manual 19-21 (Dec. 1, 2014).

³⁹ N.C. Gen. Stat. § 15A-1340.13(g), (h) (2018); N.C. Structured Sentencing Training & Reference Manual 32-33 (Dec. 1, 2014). Extraordinary mitigation is not available for Class A or B1 felonies; certain drug trafficking offenses, or offenders with a prior record score of 5 or higher. § 15A-1340.13(h).

⁴⁰ N.C. Gen. Stat. § 15A-1340.16(d) – (e) (2018); N.C. Structured Sentencing Training & Reference Manual 22–24 (Dec. 1, 2014).

⁴¹ N.C. Gen. Stat. § 15A-1340.16(d)(20), (e)(21) (2018); N.C. Structured Sentencing Training & Reference Manual 22–24 (Dec. 1, 2014).

⁴² N.C. Gen. Stat. § 15A-1340.16(e)(7) (2018) (aiding in the apprehension of another felon or assisting the prosecution by testifying truthfully in the prosecution of another felony is a mitigating factor); N.C. Gen. Stat. § 15A-1340.16(e)(15) (2018) (accepting responsibility for one’s criminal conduct is a mitigating factor). See also N.C. Structured Sentencing Training & Reference Manual 24 (Dec. 1, 2014).

Q. Are there limits on the degree of durational (length-of-custody) departure?

Yes, the top of the aggravated range in each grid cell constitutes the upper limit for an aggravated duration that may be imposed, and the bottom of the mitigated range constitutes the lower limit for a mitigated duration.⁴³

Q. Are there limits on the availability of dispositional departure (executed-prison vs. stayed sentence)?

Yes, dispositional departures are extremely limited. When an active sentence is the only disposition option indicated, a judge may not impose a non-active sentence absent “Extraordinary Mitigation,” which requires the court to find that: (1) extraordinary mitigating factors of a kind significantly greater than the normal case are present; (2) such factors substantially outweigh any aggravating factors; and (3) the imposition of an active sentence would be a “manifest injustice.” Extraordinary mitigation is not available for Class A offenses, Class B1 offenses, drug trafficking or drug trafficking conspiracy offenses, and for felons with five or more prior record points. The prosecutor may appeal an imposition of extraordinary mitigation.⁴⁴

4. PRISON RELEASE DISCRETION

Q. Does the jurisdiction utilize parole release discretion or has it been abolished for all or most offenders?

In 1994, with the passage of the Structured Sentencing Act, the North Carolina General Assembly eliminated parole release discretion for crimes committed on or after October 1, 1994.⁴⁵ (The Parole Commission retained discretion for offenders whose crimes were committed prior to that date.⁴⁶) Offenders may now be placed on post-release supervision after completing their minimum sentence and serving a statutorily-determined portion of their maximum sentence.⁴⁷

In addition, North Carolina’s 2011 Justice Reinvestment Act created an Advanced Supervised Release (ASR) program under which judges, at sentencing, may require eligible offenders to complete certain risk reduction incentives while serving their active sentence. Those who successfully complete the risk reduction programs as part of the terms of ASR are granted early supervised release.⁴⁸ However, the ASR program has seen limited usage as of 2017.⁴⁹

⁴³ See N.C. Gen. Stat. § 15A-1340.17(c) (2018); N.C. Structured Sentencing Training & Reference Manual 25 (Dec. 1, 2014).

⁴⁴ N.C. Gen. Stat. § 15A-1340.13(g)–(h) (2017); N.C. Structured Sentencing Training & Reference Manual 32–33 (Dec. 1, 2014).

⁴⁵ N.C. Dep’t of Public Safety, *North Carolina Post-Release Supervision and Parole Commission*, <https://www.ncdps.gov/index2.cfm?a=000003.002210> (last visited July 31, 2019).

⁴⁶ N.C. Dep’t of Public Safety, *Parole Process*, <https://www.ncdps.gov/about-dps/boards-commissions/post-release-supervision-parole-commission/parole-process> (last visited July 31, 2019).

⁴⁷ N.C. Gen. Stat. §§ 15A-1368.2 – 1368.6 (2018). See also N.C. Structured Sentencing Training & Reference Manual 36 (Dec. 1, 2014). For example, offenders convicted of Class F through I felonies are placed on post-release supervision nine months before the end of their maximum sentence, whereas offenders convicted for Class B1 through E felonies are placed on supervision twelve months before the end of their maximum sentence. *Id.*

⁴⁸ See N.C. Gen. Stat. § 15A-1340.18 (2018); N.C. Structured Sentencing Training & Reference Manual 45–46 (Dec. 1, 2014).

⁴⁹ North Carolina Sentencing and Policy Advisory Commission, *Justice Reinvestment Act Implementation Evaluation Report 11* (Apr. 15, 2018).

Q. Does the state have a “truth in sentencing” law, limiting the extent of early release?

North Carolina utilizes determinate sentencing, meaning the offender will serve a specified duration that cannot be changed by a parole board or other agency. Offenders sentenced to a term of prison must complete the minimum sentence pronounced by the court. The maximum sentence may be reduced to, but not below, the minimum term by earned time credits.⁵⁰ Offenders are also subject to a period of statutorily-determined post-release supervision, based on the severity level of the offense of conviction.⁵¹ Thus, offenders will serve not less than the minimum term pronounced by the court, nor more than the maximum term less any applicable period of post-release supervision.

Q. Do recommended and imposed sentences under the guidelines set the minimum time to serve in prison, the maximum, both the minimum and maximum, a target/recommended/expected prison duration, or some other combination of these parameters?

The ranges shown on the North Carolina felony grid represent the defendant’s minimum sentence. The maximum term is then set by statute, based on the minimum term imposed. For Class F through I, the maximum sentence length is set at 120 percent of the minimum sentence length rounded to the next highest month plus an additional nine months for post-release supervision. For Class B1 through E, the maximum term is set at 120 percent of the minimum term rounded to the next highest month plus an additional 12 months for post-release supervision. For Class B1 to E sex offenses, the maximum term is set at 120 percent of the minimum term rounded to the next highest month plus an additional 60 months for post-release supervision.⁵² Class A offenses, by statute, trigger an automatic life without parole or death sentence.⁵³ For misdemeanor sentences, the misdemeanor grid provides the permissible range of sanction duration as well as the possible disposition; the judge selects the sentence to be served rather than the minimum as with the felony grid.⁵⁴

Q. Is the period of post-prison supervision independent of any unserved prison term?

All North Carolina felony offenders who receive an active sentence, or whose probation is revoked, are subject to a mandatory period of post-release supervision. The terms of post-supervision release are built into the sentence and represent the unserved portion of the maximum sentence. For example, an offender imprisoned for a Class F through I felony must be released and placed on post-release supervision on the date equivalent to the maximum sentence, less nine months, less any earned time credit. An offender imprisoned for a Class B1 through E felony must be released onto post-release supervision 12 months prior to the expiration of the maximum sentence less any earned time credit.⁵⁵

⁵⁰ N.C. Structured Sentencing Training & Reference Manual 34 (Dec. 1, 2014).

⁵¹ N.C. Gen. Stat. §§ 15A-1368.2 – 1368.6 (2018); N.C. Structured Sentencing Training & Reference Manual 36 (Dec. 1, 2014).

⁵² N.C. Gen. Stat. § 15A-1340.17 (2018); N.C. Structured Sentencing Training & Reference Manual 28–29 (Dec. 1, 2014).

⁵³ N.C. Gen. Stat. § 15A-1340.17(c) (2018). Individual crime statutes will further clarify if the crime is a Class A felony punishable by death or life imprisonment. See, e.g., N.C. Gen. Stat. § 14-17(a) (2018) (stating that murder in the first degree is punishable by death or life imprisonment). See also N.C. Structured Sentencing Training & Reference Manual 42 (Dec. 1, 2014).

⁵⁴ N.C. Structured Sentencing Training & Reference Manual 59 (Dec. 1, 2014).

⁵⁵ N.C. Gen. Stat. § 15A-1368.2 (2018). In addition, an offender imprisoned for a Class B1 through E sex felony must be released onto post-release supervision on the date that is equal to 60 months prior to the expiration of the offender’s maximum sentence. Sex felons must additionally register as sex felons with the Sex Offender and Public Protection Program. N.C. Gen. Stat. § 15A-1368.4 (b1) (2017). See also N.C. Structured Sentencing Training & Reference Manual 47-48 (Dec. 1, 2014).

Q. What good-time credits do prisoners earn? Is program participation considered?

The Structured Sentencing Act provides for earned time credit for both felony and misdemeanor offenders. For felonies, an offender sentenced to an active punishment must serve the minimum term imposed and may earn time credits to reduce the maximum term.⁵⁶ For misdemeanors, the offender may receive earned time credit of up to four days per month of active incarceration.⁵⁷

In addition, if the court orders the offender to serve their sentence through the Advanced Supervised Release (ASR) program, the offender may earn advanced release by successfully participating in prescribed risk-reduction programs.⁵⁸ The Secretary of Public Safety is responsible for adopting rules to specify the rates at and circumstances under which earned time may be earned or forfeited.⁵⁹

Q. Are prisoners subject to exceptional, “second-look” releasing mechanisms?

Sentences of life without parole may be commuted by the Governor, but other prison terms are not subject to second-look releasing mechanisms.⁶⁰

5. RELATIONSHIP TO CRIMINAL LAWS

Q. Did the guidelines replace some or all previous statutory maxima?

Yes. For felony Class B1 through I offenses, the North Carolina Structured Sentencing system includes maximum sentence tables. These tables set the maximum sentence (expressed in months) unless a maximum is otherwise provided in statute for a specific crime. For Class F through I offenses, the maximum sentence is equivalent to 120% of the minimum rounded to the next highest month plus an additional nine months for post-release supervision. For Class B1 through E offenses, the maximum sentence is equivalent to 120% of the minimum rounded to the next highest month plus an additional twelve months for post-release supervision.⁶¹ For misdemeanor offenses, the full range of authorized punishment is established in a chart published in statute.⁶²

Q. Are guidelines built on top of (i.e., equal to or more severe than) any remaining mandatory minima, or are they set independently and over-ridden whenever a mandatory applies?

The North Carolina Structured Sentencing system is set independently and functions as the minimum. For certain offenses (manufacturing methamphetamine, offenses committed with a firearm or deadly weapon), if additional facts are alleged in the indictment and proven to a jury, the minimum sentence must be

⁵⁶ N.C. Gen. Stat. §§ 15A-1340.13(d) (2018). N.C. Structured Sentencing Training & Reference Manual 34 (Dec. 1, 2014).

⁵⁷ N.C. Gen. Stat. § 15A-1340.20(d) (2018).

⁵⁸ See N.C. Gen. Stat. § 15A-1340.18 (2018); N.C. Structured Sentencing Training & Reference Manual 45–46 (Dec. 1, 2014).

⁵⁹ N.C. Gen. Stat. § 148-13(a1) (2018). It should be noted that state law also allows for an earned time credit program to reduce the period of post-prison supervision. See N.C. Gen. Stat. §§ 15A-1368.2(d)(2018).

⁶⁰ N.C. Const. art. III, § 5(6) (clemency); see N.C. Gen. Stat. §§ 15A-1340.17(c)(1) (sentencing dispositions), 15A-1368.2 (post-release supervision), 15A-1371 (parole), 15A-2002 (capital offenses) (2018). See also N.C. Structured Sentencing Training & Reference Manual 42 (Dec. 1, 2014).

⁶¹ See N.C. Gen. Stat. § 15A-1340.17(d)–(e) (2018); N.C. Structured Sentencing Training & Reference Manual 28-29 (Dec. 1, 2014). The maximum sentence for Class A offenses is life imprisonment.

⁶² N.C. Gen. Stat. § 15A-1340.23(c) (2018).

increased by a set number of months.⁶³ Additionally, some offenses carry specific minimum and/or maximum penalties that are set outside of the Structured Sentencing system.⁶⁴

Q. Are some “mandatory” minima subject to case-specific “departure” or other exception?

Some penalties specified in law may be subject to exceptions. For example, as a general rule, all drug trafficking offenders are subject to a mandatory active prison sentence. However, if the offender provides substantial assistance in the identification, arrest, or conviction of accomplices, accessories, co-conspirators, or principals, the court may sentence below the mandatory minimum or may impose an intermediate or community sanction.⁶⁵

6. CRIMINAL HISTORY SCORING

Q. What are the major components of the criminal history score?

For current felony offenses, the major components are: (1) the number and severity of prior felonies; (2) similarity of the current offense to any prior offense; and (3) custody status. Prior record points are assigned to each prior felony conviction based on its offense class, whether A, B1, B2, C, D, E, F, G, H, or I. The offense class is determined by statute. An additional point is added if all the elements of the present offense are included in any prior offense, whether or not the prior offense was used in determining the prior record level. No more than one additional point can be added for this factor. In addition, a point is added if the offender was on supervised or unsupervised probation, parole, or post-release supervision, serving an active sentence in jail or prison, or was on escape from a correctional institution while serving a sentence of imprisonment at the time the present offense was committed. No more than one additional point can be added for this factor. This factor must either be found by the jury beyond a reasonable doubt or admitted by the defendant.⁶⁶

For current misdemeanor offenses, there are three prior conviction levels. The levels simply tally the number of prior misdemeanor or felony convictions; Level I designates no prior convictions, Level II designates 1-4 priors, and Level III indicates 5 or more priors.⁶⁷

Q. Does the jurisdiction utilize “decay”/washout rules, that is, do old convictions count less or drop out? Which older convictions decay, when, and how?

No, under the North Carolina Structured Sentencing system, there are no decay/washout rules. North Carolina courts have determined that there is no statute of limitation on the use of prior convictions to determine prior record level.⁶⁸

⁶³ See N.C. Structured Sentencing Training & Reference Manual 26-27 (Dec. 1, 2014).

⁶⁴ See, e.g., N.C. Gen. Stat. § 90-95(h) (2018) (establishing penalties for drug trafficking).

⁶⁵ N.C. Gen. Stat. § 90-95(h)(5) (2018); N.C. Structured Sentencing Training & Reference Manual 33 (Dec. 1, 2014).

⁶⁶ N.C. Gen. Stat. § 15A-1340.14(b) (2018); N.C. Structured Sentencing Training & Reference Manual 11-18 (Dec. 1, 2014).

⁶⁷ N.C. Gen. Stat. § 15A-1340.21(b) (2018); N.C. Structured Sentencing Training & Reference Manual 56 (Dec. 1, 2014).

⁶⁸ *State v. Rich*, 502 S.E.2d 49, 52 (N.C. Ct. App. 1998). See also N.C. Structured Sentencing Training & Reference Manual 12 (Dec. 1, 2014).

Q. Do the Guidelines include any other significant limitations on how criminal history can be used (e.g., limits on eligibility for high-history categories; adjustments for older offenders)?

A juvenile commitment to a youth development center is not “a sentence of imprisonment” supporting a prior record point.⁶⁹ When the sentencing court must consider multiple convictions, if an offender was convicted of more than one offense in a single superior court during one calendar week, or convicted of more than one offense during a single session of district court, only the most serious conviction is counted (the one which carries the highest point total).⁷⁰

7. MULTIPLE CURRENT OFFENSES

Q. Are consecutive sentences limited? If so, how (e.g., prohibited, permissive, or mandatory in certain cases; limits on total duration; use of a multiple-counts enhancement formula)?

Consecutive sentences are not limited by the Structured Sentencing system. In the event of multiple convictions, the court may, in its discretion, run sentences concurrently, run sentences consecutively, or consolidate the offenses for judgment.⁷¹ If the court imposes a consecutive sentence, the minimum sentence length imposed for the consecutive sentences is the sum of all active minimum terms imposed in the court’s judgment.⁷² When the sentencing judge is silent on the issue of consecutive sentencing when announcing judgment, multiple sentences are concurrent by default.⁷³

Q. In consecutive sentencing, how is the offender’s criminal history taken into account?

The court must impose a sentence commensurate with the offender’s prior record, for each separate offense.⁷⁴

8. ENFORCEMENT MECHANISMS (LOCATION ON THE “ADVISORY”-TO-“MANDATORY” CONTINUUM)

Q. Are recommended sentences enforced by prosecution and defense sentence appeals?

Both the defendant and the State may appeal if the sentence results from an incorrect finding of the defendant’s prior record level or contains a sentence disposition or sentence length not authorized by the structured sentencing law.⁷⁵ The defense may appeal whether a sentence imposed outside the presumptive range (within the aggravated range) is supported by the evidence.⁷⁶ The State may appeal whether a finding of “extraordinary mitigation” is supported by the evidence or is sufficient as a matter of law to support the dispositional deviation.⁷⁷

⁶⁹ *State v. Tucker*, 573 S.E.2d 197, 200–201 (N.C. Ct. App. 2002); N.C. Structured Sentencing Training & Reference Manual 12 (Dec. 1, 2014).

⁷⁰ N.C. Gen. Stat. § 15A-1340.14(d) (2018); N.C. Structured Sentencing Training & Reference Manual 15 (Dec. 1, 2014).

⁷¹ N.C. Gen. Stat. § 15A-1340.15 (2018). See also N.C. Structured Sentencing Training & Reference Manual 34 (Dec. 1, 2014).

⁷² N.C. Structured Sentencing Training & Reference Manual 35 (Dec. 1, 2014).

⁷³ N.C. Gen. Stat. § 15A-1340.15(a) (2018); N.C. Structured Sentencing Training & Reference Manual 35 (Dec. 1, 2014).

⁷⁴ See N.C. Structured Sentencing Training & Reference Manual 35 (Dec. 1, 2014).

⁷⁵ See N.C. Gen. Stat. § 15A-1442(5b) (2018); N.C. Structured Sentencing Training & Reference Manual 46 (Dec. 1, 2014).

⁷⁶ See N.C. Gen. Stat. § 15A-1444(a1) (2018); N.C. Structured Sentencing Training & Reference Manual 46 (Dec. 1, 2014).

⁷⁷ See N.C. Gen. Stat. § 15A-1445(a)(3)(d) (2018); N.C. Structured Sentencing Training & Reference Manual 46 (Dec. 1, 2014).

Q. Are other enforcement methods used (e.g., required reasons for departure; published judge-specific departure rates; narrow permitted sentencing alternatives and/or ranges)?

Sentencing courts are statutorily limited to imposing sentences at, or underneath, the top of the aggravated sentence range.⁷⁸ A sentencing court must impose an available disposition, whether Active, Intermediate, or Community, based on the sentencing grid.⁷⁹ The only dispositional departures permitted require “Extraordinary Mitigation,” which is only available for Class B2, C, and D offenses.⁸⁰ No other dispositional enforcement methods are used. If the court departs from the presumptive ranges, it must make written findings of the aggravating and mitigating factors present in the offense.⁸¹

Q. Are some deviations from the guidelines not deemed departures?

A sentencing court must impose the appropriate sentence range and disposition to conform to the Structure Sentencing system. All deviations are departures.⁸²

Q. Do some deviations require especially strong justification? Or minimal justification?

Yes, downward dispositional departures (i.e., imposing a non-active sentence when an active sentence is prescribed) are significantly restricted. When an active sentence is the only disposition option indicated, a judge may not impose a non-active sentence absent “Extraordinary Mitigation,” which requires the court to find that: (1) extraordinary mitigating factors of a kind significantly greater than the normal case are present; (2) such factors substantially outweigh any aggravating factors; and (3) the imposition of an active sentence would be a “manifest injustice.” Extraordinary mitigation is only available for Class B2, C, and D offenses in the first two prior record levels. The imposition of extraordinary mitigation is subject to appeal by the prosecution.⁸³

For sentences in the aggravated or mitigated ranges, the judge must make written findings of the factors in the record.⁸⁴ The State bears the burden of proving beyond a reasonable doubt that an aggravating factor exists. If the offender does not admit to the existence of an aggravating factor, a jury, generally, must determine whether an aggravating factor is present in an offense. As to mitigation, the offender bears the burden of proving by a preponderance of the evidence that a mitigating factor exists.⁸⁵

⁷⁸ See N.C. Gen. Stat. § 15A-1340.17(c) (2018).

⁷⁹ N.C. Gen. Stat. § 15A-1340.17(c)(1) (2018); N.C. Structured Sentencing Training & Reference Manual 30 (Dec. 1, 2014).

⁸⁰ N.C. Gen. Stat. § 15A-1340.13(g), (h) (2018) (detailing when a court may award “extreme mitigation” to an offender); see N.C. Structured Sentencing Training & Reference Manual 32–33 (Dec. 1, 2014). “Extraordinary mitigation” is prohibited for Class A, B1, and drug trafficking offenses. Class E through Class I offenses all allow for Intermediate and/or Community punishment for at least the first two prior record levels. Thus, Classes B2, C, and D are the only Classes that allow for “extraordinary mitigation” for all prior record levels.

⁸¹ N.C. Gen. Stat. § 15A-1340.16(c) (2018).

⁸² See N.C. Gen. Stat. §§ 15A-1340.16 – 1340.17 (2018).

⁸³ N.C. Gen. Stat. § 15A-1340.13(g), (h) (2018); N.C. Structured Sentencing Training & Reference Manual 32–33 (Dec. 1, 2014).

⁸⁴ N.C. Gen. Stat. § 15A-1340.16(c) (2018); N.C. Structured Sentencing Training & Reference Manual 20 (Dec. 1, 2014).

⁸⁵ N.C. Gen. Stat. § 15A-1340.16(a) (2018); N.C. Structured Sentencing Training & Reference Manual 19 (Dec. 1, 2014).